

UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of: )  
 )  
 ) Docket Numbers  
 NORTHEAST MILK MARKETING ORDER ) AO-14-A70; AA-02-1  
 )

Virginia Room  
 Embassy Suites Hotel  
 1900 Diagonal Road  
 Alexandria, Virginia

Friday,  
 September 13, 2002

The above-entitled matter came on for  
 hearing, pursuant to Adjournment, at 8:00 a.m.

BEFORE: HONORABLE DOROTHEA BAKER  
 Administrative Law Judge

APPEARANCES:

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## I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Robert Wellington	1073	1075 1081 1089	1089	1092
William Fitchett	1096	1107 1111	--	--
James Buelow	1120 1126	1129 1136	1152	1154
Warren Schanback	1157	1173	1191	1192 1201
Cyrus Cochran	1210	1216 1217	--	--
Erik Rasmussen	1220	1224	1226	--
David Arms	1235 1262	1271 1281 1293 1299	--	--
Edward Gallagher	1308 1329	--	--	--
Peter Fredericks	1335	1337 1338	--	--
Edward Gallagher (resumed)	prev.	1339	--	--
Dennis Schad	1347 1352	1354	--	--
Dennis Arms (resumed)	1341	1370 1373 1375	--	--

## E X H I B I T S

<u>EXHIBIT NUMBER :</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
Exhibit Number 31	1095	1119
Exhibit Number 32	1095	1119
Exhibit Number 33	1157	1219
Exhibit Number 34	1229	1305
Exhibit Number 35	1229	1305
Exhibit Number 36	1229	1305
Exhibit Number 37	1229	1305
Exhibit Number 38	1308	1346
Exhibit Number 39	1336	1338
Exhibit Number 40	1347	1352
Exhibit Number 41	1366	1377

## P R O C E E D I N G S

8:00 a.m.

JUDGE BAKER: Good morning.

The hearing will please come to order. This is Day 4 of this hearing relating to the consideration of proposals to make various changes to the Northeast Schedule Milk Marketing Order. It is a public hearing, a rulemaking promulgation hearing, in which all parties who have an interest are invited to testify and indeed they can submit testimony upon any or all proposals.

If there is anyone who would like to testify or otherwise offer evidence, please let me know.

I think we were on Proposal 7 last evening, and we've had some small testimony, some minimum testimony on Proposal 1. During the first three days, there were 30 exhibits identified and/or admitted into evidence. We are now ready to proceed.

I am going to note that this is Friday, the 13th. Very well.

Mr. Beshore, prior to beginning, Mr. English wanted to make a comment.

MR. ENGLISH: Your Honor, before that happens, I think there's some people who want to be heard on that

1 issue in terms of whether that can come up or whether they  
2 should be able to do that. Vetne did not know that, and  
3 before we, you know, return to that, perhaps that should  
4 wait until the end. I think Mr. Vetne is going to make  
5 that pitch.

6 MR. VETNE: Well, we might be done before he  
7 comes into the room. He's not here, and it's not limited.  
8 Nothing's been added to Proposal 7. Well, at least his  
9 direct testimony was quite limited, and I think it's  
10 appropriate to do that.

11 MR. ENGLISH: There were a couple things  
12 yesterday.

13 JUDGE BAKER: Oh, you're keeping track, Mr.  
14 English. You know more about the presentation than I do.  
15 Mr. Vetne, we have waited for you.

16 Do you want to call your witness?

17 MR. BESHORE: Yes, I would. I'd like to recall  
18 Bob Wellington.

19 JUDGE BAKER: Very well. Mr. Wellington, you  
20 have previously been sworn in this proceeding.  
21 Whereupon,

22 ROBERT WELLINGTON  
23 having been previously duly sworn, was recalled as a  
24 witness herein and was examined and testified further as

1 follows:

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DIRECT EXAMINATION

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BY MR. BESHORE:

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Q Mr. Wellington, you've been sworn and previously testified. Were you in the room when Dr. Yonkers testified yesterday?

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A No, I was not. I had to be over on the Hill. I had a presentation before the House and the Senate staffers. So, I could not be here, and I've heard his testimony, and I found there were some mischaracterizations from the last hearing, and so the day before the hearing, my testimony from the hearing record on that, I just wanted to enter that in as to what the attention was focused on at the last hearing.

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18

19

Q Okay. By the last hearing, you're -- you mean the references in Dr. Yonkers' testimony to the proceedings in the Class 3 and 4 make allowance?

20

21

22

23

24

A Yes.

Q And that hearing took place in May 2000?

A Yes, correct.

Q In this very room, I believe.

A That is true, also.

1           Q     Okay. Now, would you just proceed with your  
2 comments in response to Dr. Yonkers' testimony?

3           A     It's basically a repeat of what I said on the  
4 hearing record at that point. It was on Pages 1486 and  
5 1487 of that hearing record. I was commenting on the make  
6 allowances, and I noted that for non-pasteurized milk,  
7 using the same criteria as Dr. Ling, he came up with a  
8 cost of 17.2 cents per pound, but the issue here is, what  
9 I further stated, that non-fat dry milk, for non-fat dry  
10 milk, clearly we could not go to a make allowance of 17.2  
11 cents because our 17.2 cents of non-fat dry milk relates  
12 to the fact that our plant is a balancer of milk and is  
13 operating at much less capacity in the mid part of the  
14 week most of the year, and during most of the week in the  
15 Fall part of the year. That's why our costs are only 17  
16 cents, because of those factors.

17                     We think that the national milk proposal of 14  
18 cents is near to where it probably should be. If we could  
19 operate our plant around the clock basically throughout  
20 the year, we think it could probably be at about that  
21 level. The additional costs at some point, we're going to  
22 have to see -- for the additional costs at some point,  
23 we're going to have to see the market taking a look at  
24 that. That's not a topic here at this particular hearing,

1 and I don't really want to discuss it, but that's why we  
2 think we should -- that's where -- that's where we think  
3 we should come from.

4 If you gave every powder manufacturer over 17  
5 cents to make powder, everybody would want to make powder,  
6 and we recognize that. So, we have to find a different  
7 way to accommodate that for the marketplace. That's why I  
8 do not agree to the point of 17 cents because I felt that  
9 was not the right hearing to be doing that as this would  
10 be and that's why -- part of the reason we sought this  
11 particular hearing.

12 Q Okay. So, in that -- in that hearing, Agrimark  
13 and ABC&E did not attempt to advocate a make allowance  
14 that also covered balancing costs in the Northeast as you  
15 have read your testimony, correct?

16 A And particularly Agmark. There was some  
17 disagreement on some of the make allowances for Class 3  
18 more than Class 4.

19 Q Okay. Thank you.

20 JUDGE BAKER: Are there any questions? Yes,  
21 Mr. Rosenbaum?

22 CROSS EXAMINATION

23 BY MR. ROSENBAUM:

24 Q Mr. Wellington, I know that you are -- well, I

1 should ask you. Did you read the final decision when it  
2 came out?

3 A Yes.

4 Q Now, Dr. Yonkers quoted at great length from  
5 that decision yesterday, and USDA's explicit conclusion  
6 that the make allowance it was setting was high enough to  
7 cover the costs incurred by the balancing plants. Do you  
8 recall those statements?

9 A Yes, I do.

10 Q And it's absolutely true that anyone had the  
11 opportunity, if they still wished, to submit comments with  
12 respect to anything and everything that USDA has stated in  
13 that final decision, correct?

14 A That's true, if we wanted to influence what  
15 that decision would be. We felt that trying to influence  
16 the make allowance to go from 14 cents to a higher amount  
17 was not something that would be appropriate.

18 Q If you simply wanted to comment and state that  
19 you disagreed with USDA's factual conclusion that the make  
20 allowance that had been set was high enough to cover all  
21 costs of the balancing plant, you had the opportunity to  
22 make --

23 A I had the opportunity and in fact did that on  
24 the witness stand. I didn't feel I also needed to do that

1 in brief because my goal here was not to say the  
2 Department was wrong on their number.

3 Q USDA did not itself participate at the hearing,  
4 but they are the ones who wrote the decision, based upon  
5 what they believed the hearing established, correct?

6 A Correct.

7 Q And ABC&E had the opportunity to file comments  
8 stating that although they potentially, conceivably,  
9 stated that although they disagreed with the make  
10 allowance, they thought the Department was wrong in  
11 characterizing the make allowance as being large enough to  
12 cover the cost of balancing. ABC&E could have said that,  
13 right?

14 A We could have, although like I said, we  
15 normally put in comments if we disagree with the  
16 conclusion of the Department, and if -- and -- and in that  
17 instance, we did not disagree with the conclusions of what  
18 they were trying to do.

19 Q Well, -- and -- and what you did tell the  
20 Department is that it "should use all credible, reliable  
21 information available to it", and you believe the  
22 Department did so and commend the decision in that regard.  
23 That's what ABC&E actually told the Department in the  
24 comments it filed on February 9, 2001?

1           A     And -- and in regard to the 14-cent make  
2     allowance, we believe the Department did do that. Even  
3     though we had a higher make allowance, we thought that  
4     that -- if we were going to deal with the orderly  
5     marketing issue, we had to come up with a make allowance  
6     that we felt was a reasonable one for the whole country  
7     because this was the entire Order, and we were -- it would  
8     not be reasonable for me to be representing dairy farmers  
9     to come up with a higher make allowance to represent our  
10    balancing. We thought that needed to be directly handled  
11    by -- by balancing issues, such as marketwide service  
12    guidance.

13           Q     Well, but the Department had also stated that  
14    it was sure that it was covering the cost of balancing  
15    because the RDS survey on which it was basing the make  
16    allowance had itself been based upon the cost of plants  
17    that were operating at less than 50 percent capacity,  
18    correct?

19           A     That's correct, and I can tell you that I  
20    testified that I disagreed with that particular cost study  
21    that was done. I don't think it was done with the same  
22    intentions.

23           Q     And -- and -- and the fact of the matter is,  
24    sir, you testified already at this hearing that your

1 plants are operated at greater than 50 percent capacity on  
2 an annual basis?

3 A Yes, they are.

4 Q And you've also testified at this hearing that  
5 -- that USDA should not attempt to set marketwide service  
6 payments to cover the balancing costs incurred by any  
7 particular plant, right?

8 A I think it should be covering the plants  
9 involved. I can tell you what our particular costs are  
10 regarding that.

11 Q I believe you testified that the USDA should  
12 rely upon Dr. Ling's study rather than attempting to limit  
13 the cost of any individual --

14 A Yes, that is true.

15 Q Because any individual plant may be engaged in  
16 all kinds of activities other than balancing, correct?

17 A That's true.

18 Q And you don't dispute the accuracy of USDA's  
19 statement that the RDCS plants that are included in the  
20 survey that led to the make allowance in fact did operate  
21 at less than 50 percent capacity, do you?

22 A I don't -- that, I don't know. I can tell you  
23 at the time, we were operating above 50 percent capacity.  
24 We were actually operating at a higher capacity than we

1 were during 2001.

2 Q Well, I'm -- I'm trying to focus specifically  
3 on the factual conclusions that USDA had reached based  
4 upon the hearing record at the make allowance hearing  
5 which was that in other powder plants that had the RTCS  
6 survey which were the foundation of the make allowance  
7 that was set were plants that operated at less than 50  
8 percent capacity on an annual basis? Would you dispute  
9 that was true?

10 A That, I -- when I looked at that number, I had  
11 a very difficult time believing that number, but I don't -  
12 - I can't dispute it from up here.

13 Q You don't dispute that USDA reached that  
14 conclusion based upon the sworn testimony of Mr. Shad who  
15 was the one who testified --

16 MR. BESHORE: Wait a minute. That is not an  
17 accurate statement of either Mr. Shad's testimony or the  
18 record. I mean, the evidence -- the percent utilization  
19 numbers were out of the RTCS study which is not Mr. Shad's  
20 study, and he had no knowledge of any utilizations of any  
21 of the plants, other than perhaps as it relates to that  
22 study. So, that is completely unfair to attribute those  
23 factors in that study to Mr. Shad.

24 JUDGE BAKER: You could ask him whether or not

1 he disputed it.

2 MR. BESHORE: Well, the premise was misleading  
3 and incorrect.

4 JUDGE BAKER: He could state if he disputed it,  
5 Mr. Beshore.

6

7 BY MR. ROSENBAUM:

8 Q Let me simply ask you, Mr. Wellington. Do you  
9 recall Mr. Shad taking the stand and testifying at these  
10 hearings that the average plant utilization at the plants  
11 that were included in the RTCS cost study operated at an  
12 annual average utilization of 47.9 percent?

13 A No, I didn't record that. I didn't recall  
14 that.

15 MR. ROSENBAUM: That's all I have.

16 JUDGE BAKER: Thank you, Mr. Rosenbaum.

17 Are there other questions for Mr. Wellington?

18 Yes, Mr. Tosi.

19 CROSS EXAMINATION

20 BY MR. TOSI:

21 Q Thank you for appearing again this morning,  
22 Bob.

23 I'm confused now. Yesterday when -- when I was  
24 asking you questions, you indicated to me yesterday, if my

1 memory serves me right, that you couldn't -- you did not  
2 share what your real cost information was for balancing  
3 and that you relied on the Ling study to tell you what it  
4 is, and then once you got that, then you in turn agreed  
5 with what he told you what it cost and you agreed with it.

6 A To isolate those costs of balancing, Gino. We  
7 were talking at the other hearing what the costs were of  
8 making powder, okay, and then the cost per pound to get a  
9 make allowance. At this point, we were trying to isolate  
10 because there are more cost factors involved. So, we were  
11 trying to isolate those costs. If I were to  
12 look at those same cost basis now, they would be slightly  
13 higher. I don't have the numbers, but I know all the cost  
14 factors have gone up and our pounds have gone down during  
15 the 2001 comparison.

16 Q To the extent that you're saying that you know  
17 what your costs are today, do you see that as being  
18 something different -- with regard to your testimony  
19 today, is it fair to characterize it this way, that you  
20 know what your total costs are, but the costs that you're  
21 attributing as a result of balancing Class 1 market is --  
22 is -- is -- this would be a more difficult point to  
23 isolate -- to balance that total cost, how much of it  
24 could be attributable to Class 1 was isolated?

1           A     The total cost of the plants involved, yes.  
2     The total cost -- the total cost. That's what we were  
3     trying to isolate within the plant, what those costs were.  
4     This issue right now that I was concerned about was the  
5     fact that he did not say, gee whiz, we have this wonderful  
6     make allowance and it covers our market, that I  
7     specifically said that that was an issue that needed to be  
8     directed -- that needed to be handled separately from the  
9     make allowance issue because if you accommodate plants  
10    that were operating at 50 percent capacity, then you could  
11    make a lot of money at a 100 percent capacity and not want  
12    to reduce money for the Class 1 market.

13           So, I mean, that's -- that's the issue, saying  
14    that we needed to focus it on that. That was the point,  
15    that we did not say everything was hunky dory on Class 4.  
16    We needed our market service to look at that, and I said  
17    that back at the hearing, too.

18           Q     Okay. The cost things that you're talking  
19    about today would be total costs?

20           A     Making powder at our plant, correct.

21           Q     Okay. That cost does not include then cost  
22    that's attributable to balancing plants in the Class 1  
23    market?

24           A     It includes the cost of making powder at our

1 plants. We make powder at balancing plants in the Class 1  
2 market and we incur that cost. There's a different issue  
3 --

4 Q Okay. But it seems, at least the way I think I  
5 understand right now, how perhaps you relied on one study  
6 as to say that -- and -- and the fundamental basis of  
7 Proposal 7 seems to rest on the notion of some measurement  
8 of unused plant capacity, trying to attach a value to that  
9 and attribute that and characterize that as a cost, and it  
10 would seem to me then that -- and the way that the -- I  
11 think that you're interpreting this is you're saying,  
12 well, that's -- that study then helped you isolate the  
13 costs associated with balancing because it had an impact  
14 on unused plant capacity.

15 A Yes, that's correct.

16 Q That what you're telling me is other cost is --  
17 I'm saying -- are you talking about the costs that are  
18 unrecoverable because of unused plant capacity?

19 A I'm talking about that our costs tend to be  
20 higher because of unused plant capacity. That's why we  
21 have 17 cents, right? Okay. If we were operating near at  
22 full capacity, we believe those costs would be closer to  
23 that 14-cent range. So, we have additional costs in  
24 regard to that. That's one of the reasons we have

1 additional costs back when we testified at the last  
2 hearing, and if I were to go in and isolate, well, which  
3 of those costs are associated with balancing, well, the  
4 fact is that if we did have a higher capacity, my costs  
5 would probably go down a penny a pound for every 10  
6 percent. So, maybe that's 17. If I added 30 percent on  
7 to our utilization last year which was 60, I added 10, I'd  
8 get from 17 down to 14. I mean, I'm just saying that's --  
9 that's the way we look at it on it. I can just tell you  
10 what our costs were, okay, and I can tell you that we also  
11 realized that when we tried to isolate the cost of  
12 balancing our plant, there are a lot of other factors  
13 involved. That's why we said that.

14 Q All right. Believe me, I -- I do grasp, you  
15 know, the notion that when you're attributing your costs  
16 to the product that you're making and how you assign that  
17 over, the quantity of product, and end up with -- and  
18 convert that, as I think you have, into so many cents per  
19 pound, that you're saying that that's basically what it  
20 costs and in effect it becomes your plant make allowance,  
21 if you will, but we're still taking into account all of  
22 the unused plant capacity, and if that's a total cost,  
23 being able to isolate on just Class 1, that would seem to  
24 be a number that would be something less than the total

1 that you're attributing to Class 1, and then in that  
2 regard, you know, to the extent that one wants to  
3 interpret what the Department says about the total cost of  
4 balancing, I think it's difficult to conclude that somehow  
5 the cost of balancing hasn't already been covered.

6 A What we're saying on that, you know, is that we  
7 have additional costs involved, and when that happens,  
8 just like it said in the Ling study, it brings up your  
9 average cost, your average make allowance, okay, and --  
10 and for all your products.

11 That's a way of looking at the difference in  
12 cost. You're saying, well, the 17 cents is what it costs  
13 because it has everything in it, and it's really 16 cents  
14 because you add -- because there are other factors in  
15 regard to the Class 1 differential. What I'm saying is  
16 this is the cost. This is saying what the cost is, okay,  
17 and I can tell you that at least according to Ling's study  
18 and the ones that we did, that if you lower the  
19 differential, if you raise the utilization percentage,  
20 then you can lower those per unit costs.

21 Okay. Now, if that question is saying, well,  
22 gee, should it be -- it would be 16, 15, 14, yeah, all  
23 those things would be impacted by that, which is saying  
24 that we have additional costs involved and even at the

1 other hearing, we felt that you can't accommodate a market  
2 that's doing balancing with a make allowance unless you're  
3 going to encourage production of that product.

4 If that 50 percent number -- and I can't  
5 dispute it from here, but I can just say that if that 50  
6 percent number is correct, and we get another penny per  
7 pound for every 10 percent utilization, and I'm making  
8 money at 50 percent, I'm not but if I were, at a 100  
9 percent, I'm making five cents more per pound, and I'm not  
10 going to release that money for any milk, but I get  
11 another 40-50 cents.

12 Q I can -- I appreciate your comments and your  
13 statement that if the make allowance is too high, then you  
14 put in effect the trim rate for causing that additional  
15 production.

16 A And that's why we didn't say we need 17 cents.

17 Q But to the extent that -- that the Class 3 and  
18 4 prices -- excuse me -- prices were based on market  
19 prices and that the Class 4 prices is also designed to be  
20 the market clearing price, would you say market clearing  
21 depends on the market? Depends on the cost involved in  
22 that particular market?

23 A That's why we're trying to go to a market  
24 service payment on a market-by-market region, even in this

1 market, so we can make it -- so we can adjust it so it is  
2 market-clearing because we have higher costs because of  
3 balancing. That really is the intent of why we tried to  
4 focus and separate the two issues out and that's what my  
5 comment was, that we needed to separate the two issues  
6 out.

7 Q Okay. By the way, with respect to your costs,  
8 are you -- do you factor in the revenue side of --

9 A Not against cost. If you want to factor in the  
10 revenue side, then you -- then you have profit or loss.

11 Q Okay. But when you decide to ship to the Class  
12 1 market and you do so because there's a cost and there's  
13 a revenue factor to it?

14 A We look at that, but we also, depending on the  
15 time of the year, we also look at it to make sure we serve  
16 that Class 1 market. So, that is a priority in our  
17 organization.

18 Q Okay. Wouldn't the same be true of Class 4?

19 A Sure. It's what you earn on selling Class 4  
20 products.

21 Q Right.

22 A In response to that, particularly because I'm  
23 not doing non-fat dry milk powder, I'm not going to be  
24 able to get any kind of premium product. It's a very

1 straightforward commodity. It's sold basically at or  
2 around the support price. So, it's not -- you may have  
3 pay premiums on the milk, on all your milk, you're paying  
4 some on your Class -- what's made as powder, and you're  
5 not getting anything on that. CCC doesn't give you the  
6 opportunity. So, I mean, there is -- there is issues on  
7 that, but I wouldn't think it would be like that, but it's  
8 -- it's not -- it's a much different revenue stream.

9 MR. TOSI: I think that's all I have. Thanks,  
10 Bob.

11 JUDGE BAKER: Do you have questions?

12 CROSS EXAMINATION

13 BY MR. ROSENBAUM:

14 Q Can you confirm for me, Mr. Wellington, that  
15 participants in the RTCS survey, as it was used for  
16 purposes of the make allowance, included both Land O'Lakes  
17 and the Dairy Farmers of America?

18 A Land O'Lakes was in, and I believe Dairy  
19 Farmers of America, yes. Yes.

20 MR. ROSENBAUM: That's all. Thank you.

21 JUDGE BAKER: Thank you.

22 Mr. Vetne?

23 REDIRECT EXAMINATION

24 BY MR. VETNE:

1           Q     Bob, I'm a little bit confused now. Referring  
2     to, I think it is, Exhibit 12, the Ling study in this  
3     hearing as opposed to the survey in the other hearing, is  
4     it your understanding that the intention that the  
5     marketwide service payment be based on all unused plant  
6     capacity as opposed to the unused capacity attributed to  
7     Class 1?

8           A     No. It's to Class 1. That's what the Ling  
9     study looked at.

10          Q     Okay. So, I mean, you were asked some  
11     questions that seemed to assume that all unused plant  
12     capacity was factored into the Ling costs.

13          A     If I said that, that was not my intention.  
14     Those costs were just for Ling.

15          Q     Okay. So, then there is unused capacity in  
16     manufacturing plants that is not attributable to Class 1?

17          A     Absolutely. That's once again why we went to  
18     the Ling study, to look at the isolate.

19          Q     And you don't have to include that unused  
20     capacity as part of your market service for your company?

21          A     No, no.

22          Q     And there are -- there are alternative ways of  
23     balancing daily and seasonal fluctuations. Are -- are any  
24     of those balancing alternatives available at -- at costs

1 comparable to -- to manufacturing non-fat dry milk and  
2 butter?

3 A Not to our costs. That's why we use the plant.  
4 They may be elsewhere in the market but not -- not -- not  
5 available to us.

6 Q But you do use other means on occasion?

7 A Certainly.

8 Q And to the extent you use them, you don't  
9 propose to recover the additional costs for that  
10 alternative means of balancing?

11 A If those costs are beyond what the balancing  
12 Class 1 is, yes.

13 Q That's not my question. My question is, would  
14 your balancing Class 1 use a means other than making  
15 butter and powder? Do you want to recover the additional  
16 costs for selected and different while you're balancing?

17 A Yes. It's the cost of balancing, no matter how  
18 you do it. We're looking at the efficient way for butter  
19 and powder. That's true.

20 Q So, -- so, when -- when you decide to use  
21 cheese or -- or sell milk to Wisconsin, transport milk to  
22 Wisconsin, you want to recover the additional costs from  
23 marketwide service payments to an amount in addition to  
24 manufacturing butter and powder locally?

1           A     No, because our -- what we're looking at is our  
2 costs involved. Those are a higher cost for us, and so we  
3 didn't factor in those costs. We said what we view as the  
4 most efficient, and so that's the level of cost that we  
5 thought was appropriate. If we had to move that milk to  
6 Wisconsin, it's a lot more costly for us than running it  
7 into a butter or powder.

8           Q     Okay. And so, and when you do that, would you  
9 expect to get more in marketwide service payments then?

10          A     No.

11          Q     I see. Okay.

12                   JUDGE BAKER: Thank you.

13                   Are there any other questions for Mr.  
14 Wellington? Mr. Beshore?

15                   MR. BESHORE: Just real quick, Bob.

16                               RE CROSS EXAMINATION

17                   BY MR. BESHORE:

18          Q     In -- in the three and four years when your  
19 costs were over 17 cents, how much was it per pound?

20          A     17 cents a pound for powder.

21          Q     The decision that the Secretary's about to make  
22 is around 14 cents a pound roughly, and, you know, you  
23 were satisfied with that because the uniqueness of the  
24 Northeast Market, you believe, was intended at that time

1 to address the additional costs in a marketwide service --

2 A That's what I said my testimony.

3 Q Which is why we're here.

4 A Yes.

5 Q Thank you.

6 JUDGE BAKER: Very well. Are there any other  
7 questions?

8 (No response)

9 JUDGE BAKER: Let the record reflect that there  
10 are none.

11 Thank you very much, Mr. Wellington.

12 (Whereupon, the witness was excused.)

13 MR. BESHORE: Thank you for accommodating Mr.  
14 Wellington, Your Honor.

15 JUDGE BAKER: Indeed, you are welcome.

16 Now, is there anyone else who wishes to give  
17 testimony with respect to Proposal 7?

18 (No response)

19 JUDGE BAKER: Let the record reflect that there  
20 is no response, and we are now ready to move on.

21 The first several amendments were proposed by  
22 New York State Dairy Foods, Inc. I understand from some  
23 comments last night that certain witnesses will be giving  
24 testimony on proposals out of order. That will be all

1 right, but can we call the witnesses now, please?

2 MR. ENGLISH: Your Honor, I think what we had  
3 discussed was that maybe a couple of the people who are of  
4 the non-consultant variety might testify about Proposals  
5 1, 2, 3 and 4, and then, to the extent that the proposals  
6 sort of mutually relate, we can go in a different order as  
7 convenient for the parties, especially Mr. Vetne and his  
8 clients, who have been very patient, but I would call Mr.  
9 Fitchett at this time.

10 JUDGE BAKER: Very well. Did you say you've  
11 been patient or Mr. Vetne?

12 MR. ENGLISH: I said Mr. Vetne has been  
13 patient.

14 JUDGE BAKER: Oh, Mr. Vetne's been patient.  
15 All right. Thank you.

16 MR. ENGLISH: I am just trying to move this  
17 along.

18 JUDGE BAKER: Very well. Mr. English, try to  
19 have the witness identify what proposal he is addressing.

20 MR. ENGLISH: He will.

21 (Pause)

22 MR. ENGLISH: Your Honor, in response to your  
23 question, Mr. Fitchett will address both Proposal 1 and  
24 Proposal 2.

1 JUDGE BAKER: Very well. Thank you.

2 MR. ENGLISH: Your Honor, I have handed a  
3 statement which is a cover page plus four pages and ask  
4 that be marked.

5 JUDGE BAKER: This will be so marked as Exhibit  
6 31 for identification.

7 (The document referred to was  
8 marked for identification as  
9 Exhibit Number 31.)

10 MR. ENGLISH: And a one-page table and ask that  
11 table be marked.

12 JUDGE BAKER: I don't have the one-page table,  
13 do I?

14 MR. ENGLISH: Sorry, Your Honor.

15 JUDGE BAKER: Very well. Thank you.

16 That shall be marked as Exhibit 32 for  
17 identification.

18 (The document referred to was  
19 marked for identification as  
20 Exhibit Number 32.)

21 MR. ENGLISH: Mr. Fitchett was previously sworn  
22 and testified and actually already gave the first three  
23 paragraphs of 30. So, when I ask him to start, he'll  
24 actually start, you know, with the part that says Proposal

1 1.

2 JUDGE BAKER: Very well. Thank you.

3 Whereupon,

4 WILLIAM FITCHETT

5 having been previously duly sworn, was recalled as a  
6 witness herein and was examined and testified further as  
7 follows:

8 DIRECT EXAMINATION

9 BY MR. ENGLISH:

10 Q But, Mr. Fitchett, first, if I may have you  
11 explain what it is that is now Exhibit -- marked as  
12 Exhibit 31, your Table 1?

13 A 31 or 32?

14 Q I'm sorry? 32.

15 A This -- this table I put together based on  
16 changes that we are proposing in terms of reporting dates  
17 and therefore the following changes that would accompany  
18 those changes in the reporting dates. The first column  
19 obviously are the months. The second column is the  
20 current date of the partial payment due date in the year  
21 2002. The second column is the final pay date in the year  
22 2002, and the third column represents the spread in terms  
23 of numbers of days between the partial pay date and the  
24 final pay date for the producers.

1           Q     Go ahead.  I was going to ask, what is the  
2           purpose of this table?

3           A     The purpose of this table is to show what the  
4           spread of dates are between the partial and the final and  
5           to determine what the proposed change would affect the  
6           change in the pay dates between the partial and the final.

7           Q     And the spread variance describes what?

8           A     The spread variance on the far right column  
9           describes the decrease in the number of days between the  
10          partial payment and the final payment, based on our  
11          proposal to change the partial pay date.

12          Q     And is that variance that you're describing in  
13          your testimony?

14          A     That's correct.

15          Q     Why don't you go ahead and give your testimony  
16          that appears in Exhibit 31 but don't repeat the paragraphs  
17          you gave yesterday?

18          A     Marcus Dairy strongly supports the change  
19          proposed to move the handler milk reporting date to the  
20          Market Administrator from the 9th to the 10th of the  
21          month.  The extra day will help to get more accurate  
22          information from the cooperative and to eliminate in our  
23          need to estimate some of the numbers in order to file  
24          reports on time.

1           Marcus has experienced several errors during  
2 the inception of the new regulation. In fact, estimates  
3 of values to send to the Market Administrator are often  
4 used due to information -- due to late information from  
5 the cooperative. One of these errors occurred in October  
6 2000 and one was not caught until audited in June of 2002.  
7 This \$25,000 overpayment to the pool has been acknowledged  
8 but still not credited to our account.

9           Much of the milk that is supplied to the  
10 cooperative to Marcus Dairy is co-mingled with Marcus  
11 independent producer milk. Many of the complexities for  
12 following this milk, along with the necessity of component  
13 value pricing, which is new to Order 1 and Order 2, make  
14 the reporting date requirement difficult to attain. The  
15 extra day would be welcome relief.

16           Part 2. The proposal to move the reporting  
17 date should be accompanied by the proposed change to move  
18 the Market Administrator producer price differential  
19 announcement date. There needs to be some flexibility for  
20 the Market Administrator with this announcement date with  
21 regards to weekends and holidays. The proposal by the New  
22 York State Dairy Foods recognizes this need. It allows  
23 the Market Administrator some flexibility with the  
24 announcement date by suggested producer price

1 differentials announced on the 14th or the first day the  
2 MA office is opened for business thereafter.

3 Part 3. The New York State Dairy Foods, Inc.,  
4 proposal to move the dates described above also requires  
5 similar movement to comply with the date of payment to the  
6 producer settlement fund. ACH bank transfers many times  
7 take a minimum of two days to complete, and the language  
8 requiring payments be made not more than two days after  
9 the producer price differential announcement is consistent  
10 with current timing.

11 Part 4. Payments to producers and cooperative  
12 associations need to follow the adjusted date of the  
13 producer price differential announcement. New York State  
14 Dairy Foods, Inc., proposal suggests the cooperative  
15 payment continue to be the day after the PPD announcement.

16 Marcus Dairy has had many of their independent  
17 producers complain about the length of time between the  
18 partial payment and the final payment. Under former Order  
19 1 Guidelines, partial payment was made on the fifth of the  
20 following month for the first 15 days' production. Under  
21 the former New York/New Jersey Order 2, the partial  
22 payment was made on the 30th or the last day of the  
23 current month for the first 15 days' production. The  
24 credit requirement for making the partial payment on the

1 26th of the current month for the first 15 days'  
2 production creates a longer time between payments with the  
3 final payment as late as the 20th of the following month.  
4 In fact, Marcus Dairy has been asked and has provided  
5 additional payment advances 45 times over the past 20  
6 months.

7           The proposal by the New York State Dairy Foods  
8 is to change the partial payment requirement date to the  
9 30th of the current month and to move the final payment  
10 date to the day after payment from the producer settlement  
11 fund which is the current regulation. This addresses the  
12 issue of reducing the time between partial and final  
13 payments. Table 1 compares those two payment methods.

14           That's the end of my statement on Proposal 1.

15           Q     Would you like to give testimony on Proposal 2?

16           A     I would. Proposal 2. The New York State Dairy  
17 Foods, Inc., Proposal Number 2 is designed to assure an  
18 adequate supply of milk for the Class 1 market. The new  
19 ability of cooperatives to market independent milk and  
20 other smaller cooperative milk supplies enables them to  
21 show a much larger percentage sale to a Class 1 market.  
22 The independent milk supply and many smaller cooperative  
23 milk supplies have historically been associated with Class  
24 1 fluid milk markets or pool distributing plants.

1           The request to increase the shipping  
2 requirement from August to the November period by 5  
3 percent would help to assure the supply to Class 1 when it  
4 is most needed. Marcus Dairy in the Fall of 2000 had a  
5 shortfall of milk that could not be covered by its normal  
6 cooperative agreements. In order to supply our customers,  
7 milk had to be procured through other means. The Market  
8 Administrator did increase shipping requirements for the  
9 following months to help correct this situation. This  
10 demonstrates the need to maintain the right of the Market  
11 Administrator to enact a "call" when conditions warrant.  
12 The proposal to increase the shipping percentage will help  
13 to alleviate the shortfall.

14           Q     Mr. Fitchett, on the second page, there's  
15 referenced something called ACH Bank Transfers. For the  
16 clarity of this record, what does ACH Bank Transfers stand  
17 for?

18           A     I'm not sure I know what ACH is, but it's the  
19 requirement from the Market Administrator as to the way  
20 they want their payments. They're basically wire  
21 payments.

22           Q     So, it's your experience that -- that the posts  
23 basically take two days to complete?

24           A     That's correct. In most cases.

1           Q     Now, with respect to the issue of -- of the  
2     report on the 9th of the month, the problem, as I  
3     understand it, is that you receive reports from people  
4     from -- from the end users from whom you receive milk that  
5     you have to turn around and turn these reports into the  
6     Market Administrator, correct?

7           A     That's correct.

8           Q     And many of those reports that you and -- let  
9     me back up a moment. You are not only the vice president  
10    and general manager of Marcus Dairy, you are also the  
11    president of the New York State Dairy Foods, correct?

12          A     That's correct.

13          Q     And the association -- you're not just  
14    testifying only on your own behalf, you're also testifying  
15    on behalf of the association, is that correct?

16          A     That's correct.

17          Q     And so, you have talked to members of the  
18    association and you yourself have experienced  
19    circumstances in which the reports filed with you by other  
20    handlers are not received in a timely basis allowing you  
21    to file on a timely basis with the Market Administrator,  
22    correct?

23          A     That's exactly correct. In fact, the most  
24    recent Monday, this past Monday, for filing requirements,

1 the latest -- the earliest we received reports from  
2 outside was like 6:00 at night. We had already estimated  
3 and filed the report with the Market Administrator. So,  
4 we had estimated numbers as opposed to finalized numbers  
5 in that report.

6 Q And -- and in your experience when you've filed  
7 estimated numbers, have you had to correct those later?

8 A Very difficult to do after the fact. It  
9 usually waits for an audit. In some cases, we are able to  
10 correct the following month when we have compliance.

11 Q But for instance, you have one outstanding one  
12 that leaves you as an overpayment of \$25,000?

13 A That's correct.

14 Q And you're a small business?

15 A That's correct.

16 Q And this is not really the exception, this has  
17 sort of become -- the situation has sort of become the  
18 norm with respect to the report?

19 A Unfortunately, since the change in the Federal  
20 Order Reporting System, we have more times than not not  
21 received the information on time, so that we could make  
22 accurate reports or we've had to wait and delay. The fact  
23 is, the Market Administrator has been very lenient in  
24 terms of giving us extra time, if it was necessary, to

1 wait for those reports, but the fact is that it's  
2 difficult and sometimes impossible to give them the  
3 complete information on time because it comes from several  
4 different sources. It comes from different cooperatives  
5 and they have trouble probably getting some of their  
6 information, but the fact is, it's always, always late in  
7 the day on the final day that the report is due.

8 Q And this imposes additional costs on your  
9 business as a small business, correct?

10 A Correct. We have to keep people there later at  
11 night, even work on Saturdays, to try and get these  
12 reports complete.

13 Q And without pointing fingers at any specific  
14 entity, would it be fair to say that one or more of these  
15 reports that you have spoken of for your own account are  
16 from cooperatives who are in the room or have been in the  
17 room during these proceedings, without naming specific  
18 names?

19 A That's correct.

20 Q Now, I guess one question that arises is, you  
21 move the date from the 9th to the 10th, and life being  
22 what it is, suddenly if all reports show up late on the  
23 10th, is that a realistic possibility?

24 A We would certainly hope not. The idea is so

1 that the reports get in -- as a matter of fact, it would  
2 be a great idea if the reports could come in on the 9th  
3 and we would have until the 10th to finalize our reports.

4 Q So, in other words, if -- if one of the  
5 problems identified by anybody is that -- that the reports  
6 conceivably will just move another day, one way for  
7 dealing with that would be to require other handlers who  
8 are handlers under the Order to make sure that they have  
9 all of the reports in to the handlers who must file  
10 reports with the Market Administrator on the previous day?

11 A I think that would solve the problem.

12 Q And -- and at that point then, I guess the  
13 other question would be, you've said that -- that the  
14 Market Administrator has by and large been somewhat  
15 understanding and forgiving about the situation. You  
16 would recommend at that point that -- that once the extra  
17 day is in there, that -- that enforcement be more  
18 rigorous?

19 A That would also be welcome. Not under the  
20 current circumstances, no.

21 Q So, literally, the purpose of Proposal 1 is  
22 -- is to recognize existing legitimate difficulties that  
23 you face, especially as a small business, and address  
24 those in a series of fashions that all cascade from this

1 one issue of the 9th?

2 A That's correct.

3 Q Now, the one other issue within that context is  
4 that the Market Administrator also has some time deadline  
5 that you're prepared to move, but as I understand it,  
6 you're prepared to provide flexibility to the Market  
7 Administrator? In other words, the Market Administrator  
8 doesn't have to wait, if he so chooses, correct?

9 A That's correct. We wanted to give him the  
10 opportunity, if he needed to move the date back a day  
11 because of a holiday or because it was on a weekend, and  
12 he did not have all of his information prepared, that he  
13 could certainly do so.

14 Q And that is why dates after that all cascade  
15 from the date that he actually issues the report as  
16 opposed to having a fixed date so that if he chooses an  
17 earlier date, that doesn't automatically give you extra  
18 time to do things?

19 A That's correct. He would still be bound by  
20 paying the day after and so forth.

21 MR. ENGLISH: The witness is now ready for  
22 cross examination.

23 JUDGE BAKER: Very well. Thank you.

24 Are there questions for Mr. Fitchett? Yes, Mr.

1 Beshore.

2 MR. BESHORE: Thank you.

3 CROSS EXAMINATION

4 BY MR. BESHORE:

5 Q Good morning, Mr. Fitchett.

6 A Good morning.

7 Q Mr. Fitchett, your counsel has used the word  
8 "small business" a number of times with respect to your  
9 operations, and, of course, dairy farmers are small  
10 businesses, also.

11 Could you give us within a range of perhaps \$10  
12 million the annual sales of your small business?

13 A We're approximately \$60 million.

14 Q Do you have any idea how that compares to the  
15 annual revenue of the average dairy farmer in Order 1?

16 A I would say it's considerably more.

17 Q Now, one of the requests in Proposal 1, as I  
18 understand it, is to delay the partial payment to dairy  
19 farmers from the present requirement that it be on what,  
20 the 26th or 28th of the month?

21 A The 26th, but it depends on when the -- when  
22 the Saturday -- weekends fall.

23 Q Okay. So, you want to postpone it from the  
24 26th or 28th until the 30th?

1           A     That's -- that is our proposal, yes.

2           Q     And of course, that means a postponement in  
3 cash flow to your -- to the dairy farmers in the market  
4 whatever amount of days is involved in the delay of that  
5 payment, correct?

6           A     I would say it depends on how you look at it.  
7 The fact is that we pay -- if we agree to move the initial  
8 day by a day, that automatically will move the final pay  
9 date, and so you're adjusting the length of time between  
10 the partial and the final pay date, and the problem that  
11 has arisen with us from our producers is that there's too  
12 much time in between the partial and the final pay date  
13 and that delay to them has created problems with their  
14 cash flow, and again it goes back to where they were prior  
15 to.

16                     The fact of the matter is that we believe that  
17 by moving both of these pay dates, we solve some of their  
18 problem, and it actually reduces the amount of time  
19 between the partial and final pay dates, so that they get  
20 paid actually more frequently during the month.

21           Q     Well, you don't -- are any of the dairy farmers  
22 here that make that request that their payments be  
23 delayed, payments be delayed to increase their cash  
24 management abilities?

1           A     They're not here. I think anybody that wants  
2 their pay date delayed, they're going to get more in their  
3 pay. There's no question about that.

4           Q     Okay. But, I mean, in effect, not in effect,  
5 in actuality, Proposal 1 proposes to delay, move back,  
6 both the partial payment date for dairy farmers each month  
7 and the final payment date, correct?

8           A     It does do that.

9           Q     Okay. Now, when you're on the receiving side  
10 of payments, is your business enhanced in its cash flow  
11 when that people, you know, that owe you money for product  
12 push it back for the time they pay you?

13          A     No, but they want to go back to where the old  
14 Order was and where this Order is, we'd suffer the same  
15 problem on the other side.

16          Q     Well, there have been changes in moving up the  
17 dates of payment under -- under these Orders when they  
18 were consolidated in Reform. I think we're all aware of  
19 that.

20          A     Correct.

21          Q     Okay.

22          A     The other thing we did look at, though, Mr.  
23 Beshore, was, if we did not change the partial payment,  
24 that's also in the table, if you don't change the partial

1 payment date, the proposed final payment date changes by  
2 one day and this is done by one day only, you can see what  
3 the spread in payment days are between the partial and the  
4 final.

5 Q So, you'd -- the -- since the first payment's  
6 been moved up, --

7 A No, this didn't move the first payment. It  
8 left the first payment where it currently is.

9 Q Okay. But you're just saying since it was  
10 moved up under the January 1, 2000, under the -- under  
11 Order Reform, the -- there's a greater spread now between  
12 the partial payment and the final payment than there was  
13 under old Order 2 or old Order 1?

14 A Correct.

15 Q Okay. The audits -- audits and audit  
16 adjustments relating to the reports of handlers to the  
17 Market Administrator are a part of the business of -- of  
18 the regulation, aren't they?

19 A Yes.

20 Q Okay. And the audit adjustments come some  
21 months after the reports, and they're -- they're routine  
22 and sometimes they're in the middle and sometimes they're  
23 a little bigger and sometimes there are pluses and  
24 sometimes there are minuses, is that fair?

1           A     Fair.

2           Q     Okay.  And is there a dispute with the Market  
3 Administrator with respect to the -- the account that  
4 remains, you know, unsatisfied from May?

5           A     No.

6           Q     Thank you, Mr. Fitchett.

7           A     You're welcome.

8                    JUDGE BAKER:  Are there other questions?  Yes,  
9 Mr. Vetne.

10                                    CROSS EXAMINATION

11                                    BY MR. VETNE:

12           Q     Mr. Fitchett, I'm addressing your Proposal  
13 Number 2.  What is the significance to your proposal by  
14 the factual observation in the second sentence, "The  
15 renewability of costs to market independent milk and small  
16 cooperative milk enables us to show a larger percentage of  
17 sales to the Class 1 market"?  How does that relate to the  
18 motivation behind your proposal and the problem, if there  
19 is any, that you're trying to fix?

20           A     I think Mr. Arms is going to be more qualified  
21 to speak to that than I am, but in general, and that's the  
22 only way I can speak to it, in general, the ability for  
23 them to pool 9-C independent milk with their own, most of  
24 it goes to the Class 1 market, and it certainly gives them

1 a higher percentage of their total sale to Class 1 market  
2 and so the increase to 5 percent in the times of the year  
3 that we need it, we don't think it's an undue burden on  
4 them, Number 1, and hopefully gives a little more emphasis  
5 to putting milk in the Class 1 market in Order 1 to help  
6 alleviate any shortfalls.

7 Q When you say "undue burden on them", the "them"  
8 you're referring to is the cooperative associations --

9 A Yes.

10 Q -- that pool 9-C milk?

11 Do you -- do you know why the fix for what you  
12 identify as the 9-C problem is not to adjust the  
13 qualification for 9-C milk?

14 A You're getting into technicalities now that I'm  
15 not really qualified to speak to.

16 Q The answer is you don't know why you targeted  
17 supply plants rather than 9-C as the solution to a 9-C  
18 problem?

19 A No. I looked at it in general that we just  
20 needed more milk available for the Class 1 market at that  
21 time, especially in the year 2000, when we were almost  
22 unable to supply our customers.

23 Q Prior to January of 2000, Marcus Dairy in  
24 Connecticut was pooled under the New York/New Jersey

1 Marketing Order, correct?

2 A That's correct.

3 Q During the period prior to 2000, let's take  
4 five years, did Marcus Dairy receive an adequate supply of  
5 milk?

6 A Yes.

7 Q Did -- has there been a difference in your  
8 ability to attract milk pre-Reform and post-Reform?

9 A During the year 2000 is the first time in my  
10 recollection that we had difficulty attaining enough milk  
11 supply during a couple of weeks to fulfill all of our  
12 customer orders, and since then, milk supplies have  
13 loosened up a little bit. We haven't had the same problem  
14 in 2001, as for example, that we did in 2000, and so far  
15 this year, we've not had that difficulty.

16 Q And you refer to normal -- normal cooperative  
17 agreements. Marcus has independent producer supply and --  
18 and cooperative milk supply, correct?

19 A Correct. And an outside supply, too.

20 Q But you have a contractually-committed supply  
21 from independent producers and cooperative associations?

22 A We have contractual agreements with a  
23 cooperative association, yes.

24 Q And then, you have agreements with independent

1 producers? Whether they're in writing or not, you have a  
2 contractual relationship with independent producers?

3 A Yes.

4 Q Was there anything different that you did in  
5 the Fall of 2000 that caused you a shortfall?

6 A No, sir.

7 Q It was less production by your independent  
8 producers and the cooperatives with which you had an  
9 arrangement?

10 A No. I think that it was the fact that we  
11 needed some additional milk supply above what was ordered  
12 the prior week. We order milk on Thursday for the  
13 following week, and if in fact there's a shortfall, the  
14 normal routine is to call up as early as possible and  
15 hopefully we can get the additional milk supply needed at  
16 the end of the week and that had been going on for years,  
17 and it was never an issue at all. We called, I think it  
18 was, on the Friday afternoon we made the order and said  
19 you made a mistake, we need an extra couple tanks of milk  
20 and the extra couple tanks of milk were unavailable. So,  
21 it really made us scramble for the rest of that week to  
22 continue to fulfill our customer orders.

23 Q And the call-in you're referring to is a call  
24 to the cooperative association whom we have our agreement

1 with?

2 A That's correct.

3 Q You'll call your independent producers and tell  
4 them what you need for the week, is that correct?

5 A We take all the milk they can give us.

6 Q And in order to meet the shortfall that you had  
7 in the Fall of 2000, did you supply that additional  
8 requirement through calls to others or did your  
9 cooperative association, the cooperative association  
10 supplying you, make arrangements for that additional milk?

11 A No. We had to make the arrangements and made  
12 calls to others.

13 Q And you -- you pay a bit of a premium for that  
14 extra milk?

15 A Yes, sir.

16 Q More than the premium you would have paid a co-  
17 op that ordinarily supplies you?

18 A Yes, but it wasn't a question of price at that  
19 time. It was a question of getting the milk supply.

20 Q And you think that if -- if the standard -- if  
21 the proposal was adopted which increases shipping  
22 requirements all the time by 5 percent, that you would  
23 have an easier time getting milk?

24 A We think so.

1           Q     You would have had an easier time because  
2     instead of a seller's market, you would have essentially  
3     been in a buyer's market where there milk looking for a  
4     pool home?

5           A     I don't know the answer to that.

6           Q     Okay. Do you know where that milk would come  
7     from if there was an additional 5 percent shipping  
8     requirement?

9           A     I'm not sure.

10          Q     If there is a 5 percent shipping requirement  
11     and the ordinary circumstances apply that you've had for  
12     five years before Federal Order Reform and most of the  
13     time since and that milk were shipped to meet the  
14     requirement, it would displace milk that's already being  
15     received from Class 1, wouldn't it?

16          A     I'm not sure I followed that, John.

17          Q     If your plants and other plants are now being  
18     supplied and -- and there is a requirement for more milk  
19     to come in Class 1, and the Class 1 market is currently  
20     being served, there would be no milk to move in to meet  
21     the requirement forcing milk to move out to make room for  
22     the milk that comes in, isn't that correct?

23          A     That's correct.

24          Q     Do you have any idea where the milk that comes

1 in would come from and where the milk that moves out would  
2 go to?

3 A Not exactly, no.

4 Q Do you agree that the scenario that I've  
5 painted would create a lot of transportation costs and  
6 shelf life inefficiencies?

7 A I don't know where the milk would come from  
8 exactly. It may or may not increase additional  
9 transportation. I think it would depend on the source and  
10 where the milk was going.

11 Q Do you have any idea of the location of plants  
12 and milk supplies that may not now be shipping the extra 5  
13 percent that would have to ship more if your Proposal 2 is  
14 adopted?

15 A I do not.

16 Q If field supplies are located distant from  
17 distributing plant needs, do you offer a solution for the  
18 higher hauling -- to recover the higher hauling costs  
19 associated with such required shipments?

20 A I do not.

21 Q Would you agree that there would be higher  
22 hauling costs that would be borne by somebody?

23 A If it's a distant trip, I certainly would  
24 agree.

1           Q     You've got no personal knowledge of any close  
2 by -- any milk relatively close to existing distributing  
3 plants that is not now shipping the proposed amount in  
4 Proposal 2 that would have to ship more?

5           A     I do not.

6           MR. VETNE:   That's all.   Thank you.

7           JUDGE BAKER:   Thank you, Mr. Vetne.

8           Are there any other questions for Mr. Fitchett?

9           (No response)

10          JUDGE BAKER:   There appear to be none.   Thank  
11 you very much.

12          THE WITNESS:   Thank you.

13          (Whereupon, the witness was excused.)

14          MR. ENGLISH:   The next witness also out of  
15 order is Mr. Buelow.

16          JUDGE BAKER:   Mr. Buelow?

17          MR. ENGLISH:   I'm sorry.   Move the admission,  
18 Your Honor, of Exhibits 31 and 32.

19          JUDGE BAKER:   Are there any questions or  
20 objections with respect to the introduction of evidence of  
21 what has been marked for identification as Exhibits 31 and  
22 32?

23          (No response)

24          JUDGE BAKER:   Let the record reflect that there

1 is no response.

2 Exhibits 31 and 32 are hereby entered into  
3 evidence.

4 (The documents referred to,  
5 having been previously marked  
6 for identification as  
7 Exhibit Numbers 31 and 32,  
8 were received in evidence.)

9 (Pause)

10 MR. ENGLISH: Your Honor, I'm not going to make  
11 an exhibit of this. I won't have this marked.

12 Mr. Buelow has been previously sworn and  
13 testified, so I ask that he give his statement. You asked  
14 that it be identified for us, and it will be on Proposals  
15 1, 2 and 3.

16 JUDGE BAKER: Thank you.

17 Whereupon,

18 JAMES BUELOW

19 having been previously duly sworn, was recalled as a  
20 witness herein and was examined and testified further as  
21 follows:

22 DIRECT TESTIMONY

23 THE WITNESS: Worcester Creameries Corporation  
24 and Elmhurst Dairy, Elmside Farms, and Steuben Foods are

1 in favor of the changes proposed by New York State Dairy  
2 Foods, Inc., in Proposal Number 1.

3 As I had stated earlier, I am responsible for  
4 filing all of our company's Federal Order reports. When  
5 Federal Order Reform happened in January 2000, many  
6 changes went into effect with this new Order 1. Having to  
7 compile not only butter fats but also proteins and other  
8 solids information on each producer was certainly a large  
9 change. Then having the receipts and utilization report  
10 due a day earlier was also traumatic.

11 I can tell you that almost everyone thought  
12 that in a few months, the wrinkles would be worked out and  
13 everything would flow smoothly. Whereas it certainly is  
14 much better today than it was in January of 2000, it still  
15 is not working smoothly. I would like to share with you  
16 exactly how it worked this month for us.

17 All offices were closed Monday, September 2nd.  
18 This certainly hurt but final information usually isn't  
19 compiled until the 2nd or 3rd, the reason being that we  
20 have to wait until the information from the in-transit  
21 loads are received. In our office, by the end of Friday,  
22 the 6th, we had balanced. Folks agreed upon shipping  
23 pounds with all but two of our suppliers. However, we  
24 only had component information from our own milk and one

1 other very small cooperative. We were told by the large  
2 cooperatives that we would not receive their component  
3 information until Monday noon.

4 The reality was that we did not receive any  
5 component information until 3 p.m. At 5:30, I was still  
6 missing component information on over a million pounds of  
7 milk. I then completed our reports with estimated  
8 component pounds. I then discovered that one report that  
9 our shrink on butter fat pounds was unrealistically low.  
10 After reviewing that data, I filed the report at 11:30  
11 p.m.

12 My point is receiving information from large  
13 cooperatives this late leaves no time to review the report  
14 to find possible errors. I finally received the last  
15 information that was actually due, you know, by the 9th on  
16 noon, the 10th. This month is not unlike most months.  
17 Many months, I have filed reports that contain some  
18 estimated information for the components. I am not truly  
19 finding fault with anyone. This is just what happens most  
20 months. No one in the industry has found a way to correct  
21 the problem.

22 You might ask, how do the other Orders complete  
23 this process even earlier than we do? The fact is that we  
24 are the largest Order, the largest -- with the largest

1 amount of Class 1 milk. We have -- I have heavy work in  
2 other Orders. It appears to me that milk in Order 1 moves  
3 to more locations each month than in other Federal Orders.

4 For example, many farmer in the Upper Midwest  
5 have most of their milk go through one cheese plant month  
6 after month after month. Here, a farmer may deliver to  
7 several plants every month. This certainly requires more  
8 accounting.

9 The producer differential must be announced by  
10 the 13th of the month. This month, the date falls on  
11 Friday. Payment to the producer settlement fund and  
12 cooperatives are due on Monday, September 16th. For  
13 handlers like us who package for other companies with  
14 their own producer supply, this causes -- creates a new  
15 challenge. Once we receive our detailed pool bill, we  
16 must bill our customers for their respective portion.  
17 Then we must collect from funds before the due date and  
18 pay our bill to the producer settlement fund.

19 Some months like this one, with a weekend  
20 falling during the time period, makes the process very  
21 difficult to complete in the time frame required.  
22 Payments to producers are due to the producers on Tuesday,  
23 September 17th. This means the checks must be in their  
24 hands, not mailed or en route. Producers checks must be

1 generated and physically delivered to the producer between  
2 Friday, when the price was announced, and Tuesday, the  
3 required payment date.

4 Moving the reporting date to the 9th -- from  
5 the 9th to the 10th should allow cooperatives adequate  
6 time to provide all component tests, eliminating the need  
7 to estimate. In the event reporting dates are changed,  
8 the Market Administrator's office will need an additional  
9 day to complete the pooling process to establish the  
10 price. This necessitates moving the producer payment  
11 dates back. The producer payment dates are currently the  
12 17th but this fluctuates when the 17th falls on a weekend  
13 or holiday.

14 Worcester Creameries Corporation would like to  
15 see the date for final payment become the 19th. We would  
16 also like to see the date for the advanced payments move  
17 from the 26th to the 30th of the month or the 28th or 29th  
18 in the month of February.

19 Farmers have expressed concern about the  
20 closeness of the final and advanced date and the length of  
21 time between the advanced and the final date for their  
22 current cash flow needs.

23 Proposal Number 2. Worcester Creameries and  
24 its sister companies would like to support Proposal Number

1       2. We do believe milk pooled in Order 1 should have to  
2 perform on the Order when milk is needed for Class 1. We  
3 believe there is no need to have required shipments in the  
4 months of January through July as Proposal Number 5  
5 states.

6               We also feel that shipment -- shipping  
7 requirements in the Fall months should be increased to the  
8 stated levels. Milk available for Class 1 is always tight  
9 in the Fall months. Asking suppliers to supply the  
10 proposed 15 or 25 percent of the respective months of  
11 their supply to Class 1 in the market that has a 40  
12 percent Class 1 or more is reasonable and needed.

13               Worcester Creameries -- Proposal Number 3.  
14 Excuse me. Worcester Creameries Corporation and its  
15 sister companies do support Proposal Number 3. Requiring  
16 producers to deliver two days of production to pool plants  
17 in the months of August through December is needed.  
18 Currently, producers are allowed to participate in the  
19 pool and only make one delivery for ever and ever. This  
20 encourages the writing of the pool. I have personally  
21 received inquiries of suppliers outside the Order wanting  
22 us to pool milk that physically would not perform on the  
23 Order.

24               Regarding the proposed diversion limitations,

1 old Order 1 and 4 had these limitations for many years in  
2 this market. The level with a high Class 1 market such as  
3 this, we believe it is needed. I also believe it would  
4 make milk more available to Class 1. By giving the Market  
5 Administrator the authority to adjust the diversion  
6 levels, I believe it would work very well for all parties  
7 of this Order. For the year of 2000, milk supplies were  
8 very tight in the Fall. The MA actually increased the  
9 shipping requirements. These diversion limitations could  
10 have helped, also.

11 When you are responsible for supplying milk to  
12 three plants as I am and you have -- and you call the  
13 major suppliers and they say there is no milk available at  
14 any price, there's a problem. Therefore, we strongly urge  
15 the adoption of this proposal. In years like this one,  
16 when milk is more readily available, the MA would have the  
17 authority to lower the diversion limitations.

18 Thank you for the opportunity to testify today.

19 JUDGE BAKER: Thank you, Mr. Buelow.

20 Mr. English, did you want to ask your witness  
21 any further questions?

22 MR. ENGLISH: Yes, Your Honor, if I may.

23 JUDGE BAKER: Please proceed.

24 DIRECT EXAMINATION

1 BY MR. ENGLISH:

2 Q You referenced in your statement, for instance,  
3 in September, by the end of -- after you agreed on the  
4 pounds shipped but that you didn't have the component  
5 information. Why is that important in Order 1 today?

6 A The process of preparing for the reports is the  
7 supplier and -- and the handler usually share information  
8 prior to the filing of the reports. The first information  
9 that is shared is the pounds that are shipped, and once  
10 those are agreed upon, then the supplier computes the  
11 butter fat pounds and -- and then calls us and gives the  
12 handler those pounds, and so it's important, Mr. English,  
13 to have all that information prior to the filing of the  
14 reports.

15 Q Is also part of the components the protein?

16 A Yes.

17 Q And if the protein is off, is that -- is that a  
18 problem?

19 A Absolutely.

20 Q You've been, as you testified earlier, around  
21 for a number of years and have some experience in this --  
22 around the Federal Marketing Area.

23 A Thanks.

24 Q This hearing has been going too long.

1           What I mean to say is that you have been  
2 participating as a -- as an active person, both on the  
3 farmer side and now on the handler side, and in the  
4 Northeast?

5           A     Absolutely.

6           Q     And you in particular observed changes that  
7 have occurred prior to that Order Reform and after that  
8 Order Reform, correct?

9           A     Yes.

10          Q     Now, prior to Federal Order Reform, you had  
11 these three Orders that have been put together, but, of  
12 course, these would belong to Orders 1 and the old Orders  
13 1 and old Orders 2. The old Order 1 had a partial payment  
14 date that was after the end of the month?

15          A     Correct.

16          Q     And that last one moved up significantly for --  
17 for processors -- well, with respect to processors that  
18 dealt with old Order 1, theirs were moved up literally  
19 nine or 10 days?

20          A     That's correct.

21          Q     And in your experience, what have the  
22 cooperatives done for paying their small business farmers  
23 with respect to those partial payments?

24          A     My experience is that cooperatives vary their

1 payment dates in different areas, but to a large extent,  
2 they have stayed with the old payment dates Q That  
3 is to say, the fifth of the month if it's New England?

4 A If it's New England, the fifth and the 20th,  
5 correct.

6 Q And -- and if it's in what was old Order 2,  
7 would it then be like the end of the month?

8 A The -- a lot of the cooperatives that I know of  
9 pay the advance from the 28th to the 30th and the final on  
10 the 20th.

11 Q So, whatever the discussion is about the impact  
12 on small businessmen, you know, the cooperatives have not  
13 seen fit to make those changes for their members, correct?

14 A That is correct.

15 MR. ENGLISH: The witness is available for  
16 cross examination.

17 JUDGE BAKER: Thank you.

18 Are there any questions for Mr. Buelow? Yes,  
19 Mr. Beshore.

20 MR. BESHORE: Thank you.

21 CROSS EXAMINATION

22 BY MR. BESHORE:

23 Q Good morning, Jim.

24 A Good morning, Marvin.

1           Q     I'm intrigued by the handler witnesses who are  
2     -- seem to be tending -- speaking for the benefit of their  
3     farmers' cash flow needs by requesting the right to pay  
4     them later. Can you help me with that at all? You've  
5     been -- you've been on the receiving side of that,  
6     representing the farmers on the receiving side of that  
7     cash flow.

8                     Now, how is it going to help your suppliers',  
9     independent farmers or anybody else, cash flow needs if  
10    you pay them later?

11           A     The only way I can answer that is what I said  
12    is the truth. That's what producers have said to me.

13           Q     They'd like the final check earlier. That's  
14    what they've said, right?

15           A     No. No, they really haven't, Marvin. They  
16    like the old payment dates better than the new payment  
17    dates, and one of the things they don't like about the new  
18    payment dates, I might add, is -- is the variation in  
19    dates, when it falls on weekends in that change. It's  
20    very confusing. They'd like a consistent date.

21           Q     The -- the Order does not prohibit handlers  
22    from paying, closing -- closing up the time lag between  
23    the partial and final by paying that final -- that final  
24    payment earlier, does it?

1           A     No, it does not. But it would be helpful for  
2 someone to explain to me how we can do it under the  
3 present system. There just isn't time to do that.

4           Q     You can -- you're not waiting on any payment  
5 from a pool or anything, and you're a Class 1 handler.  
6 It's your money. It's in the bank. You can write the  
7 checks.

8           A     The way the system works, when the price is  
9 announced and so forth, as I just testified, time-wise,  
10 it's virtually impossible to make that process any quicker  
11 than what we're doing now.

12          Q     Let's talk about Proposal 2. Actually, go to  
13 Proposal 2 and 3. You are -- you're encouraging  
14 supporting proposals which increase certain requirements  
15 related to deliveries to pool plants or deliveries from  
16 supply plants to -- to pool distributing plants?

17          A     Correct.

18          Q     But you are supporting the retention of what is  
19 probably the biggest pool-riding open loophole in the  
20 whole system and that's the six-month/seven-month free  
21 ride for supply plants where they have absolutely no  
22 requirement at present to deliver any milk to any  
23 distributing plant in the Order. Now, that's the way the  
24 system's presently set up, right?

1           A     That's correct.

2           Q     Okay.  So, you've got a supply plant, you know,  
3     in Ohio or anywhere that sets itself up as a pool plant  
4     during August through December, now they're in January  
5     through July.  As it's been stated in other hearings where  
6     this provision was addressed, you could pool in that  
7     supply plant all the milk in the state of Wisconsin under  
8     the Order during that period of time without any  
9     obligations to supply it to the market, isn't that  
10    correct?

11          A     That's correct.

12          Q     Okay.  And you support the retention of that  
13    provision?  That's why you believe there is no need to  
14    have required shipments in the months of January through  
15    July in Proposal 5.  That's your testimony.  Proposal 5  
16    would eliminate the free ride?

17          A     I understand what Proposal 5 will do.  I have  
18    not seen -- whereas there has certainly been people  
19    pooling milk outside the Order on the Order and during  
20    that period, I have not -- maybe I can stand corrected,  
21    but I have not seen larger volumes of milk pooled in that  
22    period of time in relation to the Fall months when there  
23    is performance requirements.

24          Q     Well, whether there has been before or whether

1       there might be afterwards, if that provision's there,  
2       you've had entreaties from folks outside the area that  
3       want to attach their milk on to the pool, and if it's not  
4       -- Proposal 5's not adopted and that's allowed, it would  
5       be an open -- an open option, would it not?

6             A     It could, yes.

7             Q     And what's your -- what's your thought? I  
8       mean, why should supply plants, wherever located, should  
9       not have -- if you want to increase the demands upon them,  
10      the minimum demands upon them at all, why should there not  
11      be minimum demands year-round? Class 1 demands year-  
12      round? Your plants need supplies year-round. What's the  
13      justification for that?

14            A     Again, as has been stated many years, I've been  
15      around a long time, I've never -- never seen a problem in  
16      supplying Class 1 plants from January through July.  
17      There's no need to demand milk moved from further  
18      distances to Class 1 plants during that period of time.

19            Q     Now, the proposal, Proposal 3, was to establish  
20      a touch-base provision. What's -- what's the problem that  
21      needs to be addressed by requiring -- let me start over.

22                    There are substantial volumes of milk within  
23      the Marketing Area that are regularly pooled by delivery  
24      to non-pool plants. You agree with that?

1           A     Correct.

2           Q     Okay.  And I think you testified yesterday  
3 probably that you'd have some -- probably have some  
4 business relations with some of those non-pool plants?

5           A     Correct.

6           Q     What is the -- what's the problem that requires  
7 the imposition of monthly two-day deliveries to pool  
8 plants by all producers?

9           A     The problem, Marvin, is what's been stated many  
10 times, is the shortness of the supply available to Class 1  
11 plants in the Fall months, and I believe this is a way to  
12 create more milk available during that period of time for  
13 Class 1.

14          Q     Well, touch -- the provision that you've  
15 proposed doesn't require any deliveries to the  
16 distributing plants, does it?

17          A     It was proposed that they would just require  
18 deliveries to pool plants.

19          Q     Right.

20          A     That's correct.

21          Q     Now, you're supporting Proposal 3, which sets  
22 diversion limits in the Orders of 60 percent and 75  
23 percent.  Do you have any -- do you have any idea why  
24 those percentages are deemed to be appropriate?

1           A     I don't think I can testify to that.

2           Q     You would agree with me, would you not, that if  
3     -- if the touch-base provisions require delivery of milk  
4     to pool plants, that milk's not really needed at the pool  
5     plant, it isn't then regularly utilized at the non-pool  
6     plant, will continue to utilize the non-pool plant, you're  
7     going to just encourage uneconomic deliveries for purposes  
8     of meeting that touch-base provision that's not there now?

9           A     It's not our intent to encourage uneconomic  
10    deliveries and that's why we left -- we have a provision  
11    in there where the Market Administrator can adjust those  
12    in times that it's necessary.

13          Q     Well, there's no -- there's no discretion given  
14    with respect to the two-day touch-base, is there?

15          A     No. It's on -- it's on the diversion  
16    percentage limit.

17                I guess I might just add, Marvin, that I --  
18    two-day touch-base period is just those Fall months. I  
19    don't think it's unrealistic for -- as a performance  
20    requirement for producers that pool under the Order.

21          Q     The touch-base at the supply plant doesn't  
22    really have anything to do with providing -- providing  
23    milk to the Class 1 market?

24          A     May or may not.

1           Q     You made the comment with respect to your  
2     proposal for the diversion -- in support of the proposal  
3     for the diversion limits, that you believed it would make  
4     more milk available for Class 1.  It's on the third page.

5           A     Correct.

6           Q     The diversions are just from pool plants, not  
7     distributing plants, right?  So, it doesn't necessarily  
8     tie that supply to -- to Class 1, does it?

9           A     Not necessarily, but I -- I work at pool  
10    plants, our pool distributing plants.

11          Q     Is it that -- the Market Administrator's  
12    exhibit on Page 63 shows that adoption of Proposal 3 would  
13    have depool -- resulted in the depooling of volumes of  
14    milk in almost every month of the year.  Is that the  
15    intention of the proposal?

16          A     No, it's not.

17          Q     Thank you, Jim.

18                   JUDGE BAKER:  Thank you.

19                                CROSS EXAMINATION

20                   BY MR. VETNE:

21          Q     Mr. Buelow, good morning.

22          A     Good morning.

23          Q     Worcester Creameries Corporation in Jamaica,  
24    New York, is a distributing plant, correct?

1 A Yes.

2 Q Does Worcester Creameries at that plant pool  
3 any milk?

4 A Yes.

5 Q Does it have independent producer milk of its  
6 own pooled at that plant?

7 A Technically, no. Milk is actually pooled at  
8 the plant in Upstate New York. Our producers supply it.

9 Q And a plant -- what plant in Upstate New York  
10 would that be?

11 A The Roxbury Plant.

12 Q Okay. And the Roxbury Plant is what kind of  
13 plant?

14 A It's a pool distributing plant, also.

15 Q Okay. How much of the milk -- what percentage  
16 of the milk at Worcester Creameries -- oh, is -- there is  
17 a -- a distributing plant in Jamaica, New York, correct?

18 A Correct.

19 Q And is it true that a portion of that -- milk  
20 coming into Worcester Creameries is tolled milk, milk that  
21 is supplied, milk that's owned by others, pooled by  
22 others, title to which is retained by others, and for  
23 which Worcester receives a -- a -- a fee to convert raw  
24 milk to some other product?

1           A     It really isn't, John, Worcester Creameries.  
2     That's Elmhurst Dairy in Jamaica, New York.

3           Q     Hm-hmm.

4           A     That's a sister company of ours, but that -- if  
5     your question asked is serving Elmhurst Dairy, yes, that's  
6     true.

7           Q     And Worcester Creameries is not in Jamaica?

8           A     Worcester Creameries is -- is a corporation  
9     that purchases milk for all three of our plants, as I  
10    justified the other day.

11          Q     Oh, I see.

12          A     And it is not a plant in itself.

13          Q     Okay. So, -- okay. Elmhurst -- Elmhurst Dairy  
14    in Jamaica, it tolls -- it provides tolling services?

15          A     Yes.

16          Q     And what portion of the milk received at  
17    Elmhurst Dairy is tolled milk versus Elmhurst's own  
18    products?

19          A     That's proprietary information, John.

20          Q     Okay. Would it be fair to say that a very  
21    large proportion is tolled versus the amount of Elmhurst's  
22    own produced milk supply?

23          A     I don't know as I want to make the comparison,  
24    but it is a large volume, yes.

1 Q Mountainside Farms doesn't appear on any  
2 handler list, and I've been looking through. What is  
3 Mountainside Farms?

4 A Mountainside Farms is a division actually of  
5 Worcester Creameries Corporation, which is, Mountainside  
6 Farms is the plant in Roxbury, New York, which is a  
7 division of Worcester.

8 Q Mountainside is the plant?

9 A Mountainside is the plant. Worcester  
10 Creameries is the producer supply.

11 Q The processor? Producer? What do you mean by  
12 producer supplier?

13 A Worcester Creameries is the supplier, is the  
14 purchasing arm of all three of these plants. However,  
15 legally, the way it's constructed, Mountainside Farms is a  
16 division of that company.

17 Q Who's the -- who's the reporting handler of  
18 Roxbury milk?

19 A Worcester Creameries.

20 Q So, Worcester Creameries for regulatory  
21 purposes is the plant operator?

22 A Yes.

23 Q And in real life, Mountainside Farms owns the  
24 plant?

1           A     Right.

2           Q     Are you aware that there are -- in -- in the  
3     Order 2, former Order 2 milkshed, New York/New Jersey  
4     milkshed, primarily New York, New Jersey and Pennsylvania,  
5     that there are a number of plants that were designated  
6     pool plants prior to January of 2000 that are no longer  
7     pool plants?

8           A     Yes.

9           Q     And those would include, for example, plants of  
10    Kraft, Friendship Dairies, Hershey, among others?

11          A     Yes.

12          Q     So that, pre-Reform, when milk was received at  
13    those plants, it was not considered diversion, it was  
14    considered received at a pool plant?

15          A     Correct.

16          Q     And post-Reform, in order for those milk --  
17    those plants to be supplied with milk, it has to be on the  
18    diversion column of the handler report now?

19          A     Correct.

20          Q     And pre-Reform, when milk was received at those  
21    plants, those receipts would come within the -- those  
22    receipts would count as touch-base receipts; post-Reform,  
23    milk coming to those plants do not count as touch-base  
24    receipts for individual producers?

1 A Correct.

2 Q You made reference to pre-existing diversion  
3 limits. Would it -- would it not be the case that in  
4 order to accommodate the milk that has historically been  
5 pooled -- has historically been pooled on Order 2, under  
6 whatever diversion limits existed then, that the diversion  
7 limits would have to be higher if -- the amount of milk  
8 that would have to be diverted would have to be higher if  
9 you take many of the largest manufacturing plants and  
10 redesignate them as non-pool plants when they used to be  
11 pool plants?

12 A If you'd like to testify on that, go ahead.

13 Q I'm asking you --

14 A I'm not sure, John.

15 Q You're not sure? Milk that used to go to a  
16 manufacturing plant that was a pool plant, that was a pool  
17 plant, --

18 A Correct.

19 Q -- did not have to be included as diverted  
20 milk?

21 A That's correct.

22 Q And now it has to be included as diverted milk?

23 A Yes.

24 Q To accommodate that in the pool, the diversion

1 limits have to be higher?

2 A Yes.

3 Q Is part of the problem that you believe is  
4 addressed by touch-base proposal milk located  
5 substantially outside of the Northeast that doesn't come  
6 into the Northeast?

7 A Would you repeat that again, John?

8 Q Is part of what -- what you perceive to be a  
9 problem that needs to be addressed by a regulatory change  
10 in the touch-base proposal, milk that is located outside  
11 the --

12 A Yes.

13 Q -- Northeast --

14 A Yes.

15 Q -- that does not come into the Northeast?

16 A Yes.

17 Q And you hope that by increasing the touch-base,  
18 more milk, wherever it's located, will at least physically  
19 come into the Northeast?

20 A Yes. Let me just go a little further. The  
21 answer is yes, if it's pooled on the Order.

22 Q And we agree that there are now fewer pool  
23 plants at which milk may touch base?

24 A Yes.

1           Q     Would your -- would that aspect of the problem  
2     be served just as well if there were a touch-base  
3     requirement that would count as touch base plants that  
4     were formerly pool plants that are located in the  
5     Northeast? In other words, two days delivery to a plant  
6     located in the Northeast as opposed to a pool plant  
7     located in the Northeast?

8           A     I don't think I want to respond to that. I  
9     -- I'd have to think that through.

10          Q     All right. Has Elmhurst Dairy in Jamaica, New  
11     York, contracted for independent producer milk supplies?

12          A     Yes.

13          Q     And has Elmhurst Dairy in Jamaica, New York,  
14     contracted for supplemental cooperative milk supplies to  
15     meet its bookings?

16          A     Yes.

17          Q     Excluding tolled milk?

18          A     Yes.

19          Q     And --

20          A     Let me clarify that. It's not -- Elmhurst  
21     Dairy, Inc., does not purchase any milk. It's always  
22     purchased by Worcester Creameries Corporation, but it in  
23     many cases is for the benefit of Elmhurst Dairy.

24          Q     Worcester supplies the sister company?

1           A     That's correct.

2           Q     So, I mean, there's -- there's -- there's a  
3 contractual relationship between Elmhurst and Worcester,  
4 right?

5           A     Correct.

6           Q     Has Elmhurst Dairy for its own needs, excluding  
7 tolled milk, received to Elmhurst Dairy for its own use  
8 received an adequate supply of milk in the years preceding  
9 Federal Order Reform?

10          A     I guess personally, I can't -- I can't testify  
11 to that. I only worked for Elmhurst six months before,  
12 seven months before Federal Order Reform.

13          Q     Okay. If there were a problem with adequate  
14 supplies of milk at Elmhurst prior to Federal Order  
15 Reform, would you not have become aware of the problem?

16          A     Probably, yes.

17          Q     Has there been any difficulty for Elmhurst  
18 Dairy in Jamaica, New York, in receiving adequate supply  
19 of milk since Federal Order Reform?

20          A     Yes.

21          Q     And could you describe when that problem  
22 occurred?

23          A     The most severe problem was in the Fall of  
24 2000.

1           Q     And during the whole Fall or portions of the  
2     Fall?

3           A     The earlier part of the Fall, before the call  
4     was instituted. It was a bigger problem after the call  
5     was instituted. It was bigger. I testified as to a lot  
6     of balancing and it's a daily situation. The same thing  
7     is true when you look at it from the perspective of the  
8     Class 1 handler. Many times, my experience has been over  
9     the last two-three years, many times you have to receive  
10    milk as a Class 1 handler on a day that you really don't  
11    need it and find a way to roll it until the day you do  
12    need it because it's not available on the day you do need  
13    it.

14          Q     Okay. When you're talking about the Fall 2000,  
15    you said the early part of the Fall, is that September?

16          A     September, yeah.

17          Q     Okay. And during every day in September or is  
18    it certain days?

19          A     It wasn't every day, but it was certain days,  
20    yes.

21          Q     And that's because Elmhurst or Worcester did  
22    not have a commitment of adequate supplies from  
23    independent producers and co-ops that regularly served it?

24          A     We were short of milk.

1           Q     Do you know where the milk came from that  
2 eventually served those needs?

3           A     Yes.

4           Q     Where?

5           A     It came from -- from cooperatives.

6           Q     I'm sorry. My question was, from what  
7 location, not from whom. Do you know where it came from?  
8 What -- what location it came from?

9           A     A variety of locations. During that period of  
10 time, we received milk from New York, Pennsylvania, from  
11 outside the Marketing Area.

12          Q     Do you know where in New York or where in  
13 Pennsylvania?

14          A     My memory is not that good. I couldn't give  
15 you all the different locations.

16          Q     All right. And -- and could you identify those  
17 who did not ordinarily serve Elmhurst through Worcester  
18 that met those needs for you?

19          A     I'm sorry. Say that again, John.

20          Q     Could you identify those entities who did not  
21 ordinarily serve Elmhurst Dairy through Worcester that  
22 served those needs for you?

23          A     I'd rather not.

24          Q     Could you state whether those entities or are

1 not members of ABC&E?

2 A I think they all were.

3 Q Okay. Could you identify the amount of extra  
4 premium that you had to pay for those products?

5 A I testified before that it was as much as three  
6 times the normal current handling charges.

7 Q Okay. And what are the normal current handling  
8 charges that are multiplied by three?

9 A That's proprietary information.

10 Q Okay. So, when you refer to normal handling  
11 charges, you're referring to the handler charges paid by  
12 Worcester/Elmhurst, etc. Then you did not mean to imply  
13 normal in the market, correct?

14 A I don't understand what you're saying, John.

15 Q You used the term "normal current handling  
16 charges".

17 A Correct.

18 Q Which you have declined to elaborate on as  
19 proprietary. My question then is, when you say normal  
20 handling charges, you're referring to handling charges  
21 paid by the company that you work for rather than those  
22 prevailing charges in the whole marketplace?

23 A I'm referring to the customary year-round  
24 contract prices that the market is familiar with.

1 Q That Worcester pays?

2 A That Worcester pays, yes.

3 Q And you're not making a comment as to whether  
4 those are normal or abnormal as respect to the market  
5 average?

6 A No.

7 Q Okay. No, you are not making that comment?

8 A I'm not making that comment.

9 Q What you describe as a problem in parts of the  
10 Fall of 2000, do you believe that increase in shipping  
11 requirements will help alleviate that kind of situation?

12 A Yes.

13 Q Okay. By requiring some plants to ship an  
14 additional 5 percent of milk?

15 A Yes.

16 Q Let's say that -- that the proposal had been in  
17 effect, and in September 2000, as a result, you would have  
18 received the additional milk. Your proposal would also  
19 require that additional milk to come to your plants in  
20 October and November of 2000.

21 A Correct.

22 Q Would that not displace milk when you didn't  
23 need it?

24 A It could, yes.

1 Q It could. You didn't have any additional --

2 A I cannot say it will but it could.

3 Q Okay. I mean, you -- you -- you wouldn't have  
4 any additional demands simply because there's additional  
5 shipping requirement, would you?

6 A No.

7 Q Consumers aren't going to drink more because  
8 there was a higher shipping requirement?

9 A No.

10 Q So, if you were already being served and there  
11 is a higher shipping requirement and milk is coming in to  
12 meet the shipping requirement rather than your need, it's  
13 going to displace somebody's milk required to go some  
14 place?

15 A And obviously it handles what it handles, John.  
16 The fact is that on certain days, even on into October and  
17 November, there was days that we did not receive the  
18 volumes we'd like. If you look at the whole period of  
19 time, yes, and so I actually believed that doing this  
20 would make a more orderly market for milk.

21 Q You had undertaken no examination of whether  
22 increasing the shipping requirements would cause  
23 displacement of more milk than it -- greater volume of  
24 milk than would -- would serve additional needs?

1           A     I have not examined that, no.

2           JUDGE BAKER: I realize there are additional  
3 questions for Mr. Buelow, but the parties, by agreement,  
4 it's two hours, so we're going to take our 15-minute  
5 recess.

6           MR. VETNE: Thank you.

7           (Whereupon, a recess was taken.)

8           JUDGE BAKER: We are now back on the record  
9 after our morning recess, and Mr. Vetne, you're  
10 questioning Mr. Buelow.

11          BY MR. VETNE:

12          Q     Mr. Buelow, Worcester and its sister companies,  
13 are they the reporting handler on the cooperative milk  
14 that they contracted for?

15          A     Yes.

16          Q     For Worcester's independent milk and the  
17 cooperative milk that are included, that is included in  
18 the handler report, what approximate average percentage is  
19 Class 1?

20          A     Between 85 and 90.

21          Q     So, Worcester -- Worcester has its Class 1  
22 needs completely supplied or almost completely supplied by  
23 independent producers and co-ops under contract, correct?

24          A     By independent producers and cooperatives,

1 correct. Yes.

2 Q Do you -- do you know -- well, strike that.  
3 You do make reference to the Class 1 utilization of the  
4 market as -- as a reference point for the reasonableness  
5 of shipping requirements, --

6 A Correct.

7 Q -- correct? Now, a lot of the milk supplied to  
8 the Class 1 market like yours is milk that is dedicated,  
9 designed, committed, contracted and sought. It's in the  
10 Class 1 market already, correct? Your supply is dedicated  
11 to Worcester, and -- and for that  
12 -- there's 85 percent Class 1 utilization.

13 Do you -- do you have any information on -- if  
14 you take out that committed milk, the milk that Marcus  
15 Dairy has committed, the milk of your dairy, the milk  
16 that's already committed to the Class 1 market and serves  
17 it and everything because it wants to, because it's close,  
18 you take out that portion of the Class 1 milk, do you have  
19 any information on the ratio of Class 1 to non-Class 1 for  
20 the balance of the market's milk supply?

21 A No, I don't, John, and these type of questions  
22 probably are better answered by our economist, David  
23 Ensler.

24 Q Okay. Would you agree with me that it's --

1 it's the ratio of -- of -- of non-committed Class 1 to  
2 excess or surplus uses that should be looked at for  
3 purposes of -- of supply rather than looking at what's  
4 already there and already committed and it's going to go  
5 there, wants to go there every day?

6 A Again, I would suggest you ask David Ensler  
7 that question.

8 Q Would you agree with me then that if -- if a  
9 performance requirement is structured so that it must  
10 necessarily come in to a plant that hasn't committed Class  
11 1 supply, it's going to displace milk that has to go  
12 through on a truck some place else?

13 A I think I've already answered that question,  
14 John.

15 Q And the answer before was yes?

16 A Yes.

17 Q Comparing old versus new, did Worcester  
18 Creameries have an easier time or a harder time or did it  
19 make no difference under the old system where the Market  
20 Administrator had a meeting and called and wants to know  
21 how the new shipping requirements are?

22 A I can't testify to firsthand knowledge of that  
23 on the old Order. I wasn't here.

24 Q Okay. With respect to your combined knowledge

1 at -- at Elmhurst/Worcester and the involvement you had in  
2 the Northeast before, do you know whether milk came when  
3 needed either easier or harder under the pre-existing  
4 rules?

5 A I -- I can't say. I think to some degree,  
6 you're comparing apples with oranges. It's different  
7 rules. It's different times. It's different markets.  
8 There's so many things that are different.

9 Q Okay. So, choosing performance standards is a  
10 matter of finding out which fruit you need to pick.

11 A Maybe apples are better than oranges.

12 Q Thank you.

13 JUDGE BAKER: Very well. Are there any other  
14 questions for Mr. Buelow? Yes, Mr. English.

15 REDIRECT EXAMINATION

16 BY MR. ENGLISH:

17 Q Sir, Mr. Vetne asked you a question relating to  
18 the difference that had happened in 2000 between September  
19 and later months.

20 A Yes.

21 Q And in answering that question, was there a  
22 part of the answer that you left out?

23 A Yes. The -- the -- in October, there was a  
24 call. The call increased the shipping requirements which

1 would certainly make a difference in the supplies that  
2 were available.

3 Q And Mr. Beshore referred you to Page 63 of  
4 Exhibit 5 for volumes of milk that were ordered in 2001  
5 and 2002, that if Proposal 3 had been adopted would not  
6 have been pooled. What is your experience with such  
7 matters?

8 A There would have been -- in the real world,  
9 people, when they know the rules, they -- they make  
10 arrangements. They -- they find ways to deal with those  
11 rules and so it's very, very hard to say that -- that this  
12 would happen if -- if that was in place because people  
13 would have done things differently.

14 Q And I think through a miscommunication or  
15 whatever, some things ended up in the record that are  
16 inaccurate. Mr. Beshore asked you about whether -- he  
17 actually asked you to agree with him that the Market  
18 Administrator does not have the authority under Proposal 3  
19 to modify the touch-base requirements.

20 Having looked at the Hearing Notice during the  
21 break, does that -- is that correct?

22 A No, it's not. Having looked at the Hearing  
23 Notice, we are proposing that the Market Administrator  
24 would have the authority to adjust both.

1           Q     Both the delivery requirements and the  
2 diversion percentages?

3           A     Correct.

4           Q     And this goes back to the series of questions  
5 by Mr. Beshore about the so-called "market period". What  
6 about Proposals 2 and 3 in your opinion may address the  
7 same philosophical issues raised by Mr. Beshore?

8           A     Proposals 2 and 3 would be increased shipping  
9 requirements and touch base and -- and so forth in the  
10 Fall months when the milk is needed. i just simply think  
11 that addresses the situation.

12           MR. ENGLISH: Thank you. I have no further  
13 questions.

14           JUDGE BAKER: Thank you.

15           Are there other questions for Mr. Buelow? Mr.  
16 Beshore?

17           MR. BESHORE: I hesitate for the longest time.

18                         RE CROSS EXAMINATION

19           BY MR. BESHORE:

20           Q     In Proposal 3, is it your intention in Part 6,  
21 when you say that the delivery requirements and the  
22 diversion percentages in Paragraphs D-3 and D-4 may be  
23 increased or decreased to refer to the delivery  
24 requirements?

1           A     It's D-3.

2           Q     Well, that talks about diversion percentages in  
3 Paragraph D-3.

4           A     D-3 is physically equivalent to two days' milk.  
5 It's the touch-base requirement.

6           Q     So, that's the language that you intend to  
7 allow the Market Administrator what, to suspend the touch-  
8 base?

9           A     Authority to adjust it.

10          Q     Pardon?

11          A     Authority to adjust it.

12          Q     Would that increase or decrease it or --  
13 eliminate it for a period of time?

14          A     It would eliminate it for a period of time.

15                 MR. BESHORE:   Okay.

16                 JUDGE BAKER:   Very well.   Thank you.

17                 Are there any other questions for Mr. Buelow?

18                 (No response)

19                 JUDGE BAKER:   There appear to be none.   Thank  
20 you very much, Mr. Buelow.

21                 THE WITNESS:   Thank you.

22                 JUDGE BAKER:   Thank you for appearing.

23                 (Whereupon, the witness was excused.)

24                 JUDGE BAKER:   Mr. English, does that conclude

1 your presentation with respect to 1, 2 and 3?

2 MR. ENGLISH: No, Your Honor, but I know that  
3 Mr. Vetne had wanted to -- to get some evidence in, and --  
4 and the only other witnesses I have are Mr. Arms and Mr.  
5 Conover, and they are flexible and can reschedule. I  
6 would recommend that they -- I -- I've had seven out of  
7 the last nine witnesses and, if nothing else, I need a  
8 little time to finish preparing on that.

9 JUDGE BAKER: Very well. Mr. Vetne, what are  
10 your presentations directed towards?

11 MR. VETNE: Your Honor, they are directed to  
12 Friendship proposals 8, 9 and 10, Proposal 11 by  
13 Friendship is withdrawn and it won't be addressed, and by  
14 presenting testimony in support of Pooling Provisions 8, 9  
15 and 10, implicitly, not expressly, it addresses all other  
16 pooling provisions which are inconsistent and irrational.

17 MR. ENGLISH: I guess that means I'll object to  
18 that characterization.

19 JUDGE BAKER: I will make a note here that even  
20 though you have withdrawn 11, if there is anyone who  
21 wishes to speak to 11, they may do so.

22 MR. ENGLISH: I have provided courtesy copies  
23 during the break, so we don't have to spend time  
24 distributing the testimony and provided the recorder with

1 four copies.

2 I'd like to ask that Mr. Schanback's statement  
3 be marked so that we have a clear copy in the record.

4 JUDGE BAKER: Very well. It shall be marked as  
5 Exhibit 33 for identification.

6 (The document referred to was  
7 marked for identification as  
8 Exhibit Number 33.)

9 Whereupon,

10 WARREN SCHANBACK

11 having been first duly sworn, was called as a witness  
12 herein and was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. ENGLISH:

15 Q Before you start, Mr. Schanback, can you  
16 describe briefly your -- your experience, hands-on and --  
17 and background in the dairy industry?

18 A Certainly. I have a B.S. in Dairy Economics,  
19 Agricultural Economics from Cornell University, and as  
20 Friendship Dairy is a family-owned business, I have been  
21 involved with the business since my teenage years. I have  
22 done many things in the business, from loading trucks to  
23 the position I hold now, which is vice president of both  
24 plant distribution, milk procurement. My expertise in the

1 business is also in market order hearings.

2 Q And how many years have you been involved with  
3 Friendship Dairy?

4 A About 25 years at this point.

5 MR. ENGLISH: Your Honor, I -- I offer Mr.  
6 Schanback as an expert both in dairy economics and  
7 marketing procurement of milk.

8 JUDGE BAKER: Are there any objections to Mr.  
9 Schanback being regarded as an expert in dairy economics  
10 and marketing procurement of milk?

11 (No response)

12 JUDGE BAKER: Let the record reflect that there  
13 are none, and he is so regarded.

14 BY MR. ENGLISH:

15 Q Mr. Schanback, do you have a prepared  
16 statement?

17 A Yes, I do.

18 Q Proceed, please.

19 A Okay. If I read too fast, please slow me down,  
20 but I'll try to move this along as best as I possibly can.

21 Q In no way will I slow you down.

22 A Good day, ladies and gentlemen. My name is  
23 Warren Schanback, and I am the Vice President of  
24 Friendship Dairies, Incorporated, a family-owned and

1 operated business with one plant which is currently  
2 regulated by the Northeast Order as a partially-regulated  
3 distributing plant. Our company with fewer than 500  
4 employees is a small business under the Regulatory  
5 Flexibility Act. The dairy farm patrons that market their  
6 milk to Friendship are also small business enterprises  
7 under the Regulatory Flexibility Act.

8 For the 40 years or so of Market Order 2's  
9 existence, we have been a fully-regulated pool plant.  
10 After Reform, we were initially regulated as a pool supply  
11 plant until a dramatically-revised set of economic factors  
12 forced us to change our pool status to a partially-  
13 regulated plant. Our dairy farm patrons no longer have  
14 the opportunity to enjoy four decades, to participate as  
15 pool producers through the Friendship Dairy's plant.

16 Our plant is unique in that it manufactures  
17 products that fall into every class in Federal Market  
18 Order 1. The vast majority of milk received at our plant  
19 in Friendship, New York, is used as Class 2 to manufacture  
20 cottage cheese, sour cream and yogurt with much smaller  
21 quantities going into products considered Class 3. We  
22 also produce a significant amount of Class 1 cultured  
23 buttermilk and non-fat dry milk to balance out our milk  
24 supply.

1           We are also somewhat unique in that we purchase  
2 approximately two-thirds of our plant's milk supply under  
3 contract from about 125 independent dairy farmer patrons  
4 who insist that we are the best outlet for their milk.  
5 The remainder of the milk we use is purchased from dairy  
6 cooperatives.

7           The following testimony is in support of our  
8 Proposals 8, 9 and 10. Proposal 11 is withdrawn.  
9 Proposal 8. When the Federal Orders were reformed in late  
10 1999, much attention was given to the fluid differential  
11 issue and just about every other issue seemed to take a  
12 back seat. In the old Order 2, there were so many changes  
13 being considered, that it was impossible to determine  
14 their effect until they were adopted. Since we were a  
15 pool plant from the Order's inception, we naively failed  
16 to identify changes to the Order language that would  
17 dramatically affect our status, such as the adoption of  
18 new performance requirements in 1001.7(c) and the  
19 extraordinary amount of additional milk represented by  
20 those new requirements for our producers to be able to be  
21 associated with the milk pool.

22           These new shipments were not due to any new  
23 demand for fluid milk. For as many years as I can  
24 remember, we had milk supply contracts with Class 1

1 handlers in anticipation of meeting the somewhat regular  
2 late Summer call. We understood that in any moment, there  
3 was the possibility that we would need to ship milk to  
4 Class 1 operations which are now defined as distributing  
5 plants, but it was a new concept to us that the Order  
6 would have substantial minimum amount written into it.

7 We also failed to identify that severe burden  
8 that the odd manner used to calculate this amount would  
9 create for us because it dramatically increased the amount  
10 of milk that would be required to establish our  
11 performance. When we consulted with the Department, we  
12 were informed that in the grand scheme of things,  
13 including the uniform provisions across all Federal  
14 Orders, our objections were immaterial. It was explained  
15 that even though this facet of the performance provision  
16 was new to the Northeast, it had pre-existed in at least  
17 one other Federal Order and was therefore justified.

18 While we believed that our plant was different  
19 from other manufacturing plants because of our location on  
20 the western regions of the Order and the extra milk or the  
21 extra value of our high Class 2 utilization provided to  
22 the pool, we could not convince anyone in the Department  
23 that this justified a grandfather exemption. We exhausted  
24 every avenue to no avail.

1           The Order language states that "such shipments  
2           must equal not less than 10 or 20, as the month may be,  
3           percent of the total quantity of milk that is received at  
4           the plant or diverted from pursuant to Section 1001.13  
5           during the month" and that's my emphasis there. This was  
6           a dramatic shift from the old pool unit concept, and since  
7           the advent of Reform, not only do we need to qualify the  
8           independent producer milk that we receive, we also have to  
9           ship milk based upon the amount of 9-C milk that we are  
10          receiving from cooperatives.

11          As applied, the current pooling rules require  
12          redundant performance on cooperative supply of 9-C milk  
13          and erect economic obstacles to manufacturing plants  
14          receiving milk from independent producers from achieving  
15          pool status. Because of the merged Order did not create  
16          any new Class 1 demand by Northeast consumers, these  
17          newly-required shipments merely displace the local milk  
18          that had previously been supplied to distributing plants  
19          and a new need to transport displaced milk to other plants  
20          for disposition.

21          Sales trends are relatively constant and over  
22          time, we have carefully cultivated a milk supply to match  
23          our sales to our patrons and cooperative suppliers. While  
24          we could have gone out and gotten a distributing plant

1 account, that still would have been a business decision  
2 that we were in control of. What we were unprepared for  
3 was such dramatically-changed Federal Order language that  
4 created an artificial need to supply so much more milk  
5 virtually overnight.

6 Fortunately for us, our cooperative suppliers  
7 were there to help get through this crisis. For a  
8 handling charge, they would provide as much milk as we  
9 needed to replace the extra milk we had to ship, but there  
10 was a catch. Every pound of milk we brought into our  
11 plant to replace what we were required to ship increased  
12 the amount of milk upon which we needed to calculate what  
13 we were required to ship. In essence, the wording of  
14 1001.7(c) had created a never-ending escalation for  
15 pyramiding of shipments of displaced milk and replacement  
16 milk.

17 The following calculations illustrate the  
18 problem of 15 million pounds per month a supply plant  
19 would encounter under Section 1001.7(c). The plant  
20 receives 10 million pounds of milk per month from  
21 independent patrons and five million pounds of milk from  
22 cooperatives. Pre-Reform, a 20 percent call would have  
23 been considered a worse case scenario. Post-Reform, it  
24 has become normal for September through November.

1           What I go through here is pre-Reform 20 percent  
2 call, you can see at the top, where the total milk supply  
3 of this plant is 15 million pounds, the independent milk  
4 supply which is 10 million pounds was what the 20 percent  
5 call was based upon, therefore requiring two million  
6 pounds of milk from this plant to be shipped for Class 1  
7 use. Post-Reform, and I use Section 7(c), Number 2,  
8 because it correlates most highly with the 20 percent  
9 above, it shows the same plant, the 10 million pounds of  
10 milk from independent milk supply, and a total milk supply  
11 of 15 million pounds.

12           If you now take the 20 percent shipping  
13 requirement, that would require that this plant supply  
14 three million pounds not to improve Class 1 use but to a  
15 distributing plant. If you would then, on the next page,  
16 replace that additional one million pounds of milk, the  
17 total milk supply now becomes 16 million pounds.  
18 Calculating the 20 percent requirement on the 16 million  
19 pounds now yields 3,200,000 pounds of milk that would need  
20 to be shipped to a distributing plant, again not to Class  
21 1 use but to the distributing plant. This process repeats  
22 on and on until you eventually come up with a number which  
23 is on Page 4, and I guess for purposes of expediency, I  
24 won't go through each one of these calculations. It shows

1 that the final result is the requirement that this plant  
2 ship 3,249,997 pounds of milk and even that is rounded  
3 because this could go on forever. That 3,249,997 pounds  
4 compared to the two million pounds is an increase of 162.5  
5 percent of shipments to qualified plant patrons milk.

6 Even by the current definition of the so-called  
7 "20 percent performance requirements" written into the  
8 current 7(c)(2) has effectively created a 33 percent  
9 shipping requirement, and this is if all things work  
10 perfectly and receipts are exactly as you anticipated. In  
11 fact, considering the consequences of missing the required  
12 percentage by a few pounds, any reasonable handler would  
13 add a few more percentage points to the minimum  
14 requirement just to be safe.

15 Proposal 8 solves the problem by specifically  
16 omitting 9-C milk from dairy farmers described in  
17 1001.12(b) as has been done in other Federal Orders. It  
18 does this while maintaining the reasonable performance  
19 requirements because it bases the calculation on the  
20 amount of milk produced by dairy farmers that is pooled  
21 through association with the supply plant, whether or not  
22 it was diverted from the plant.

23 Proposal 9. As I stated earlier in my direct  
24 testimony, Friendship has many characteristics that are

1 unique. One is the ability to produce non-fat dry milk to  
2 balance our milk supply as well as a portion of the milk  
3 of our cooperative supply partners. Another is the  
4 production and route disposition of a Class 1 product,  
5 cultured buttermilk. Post-Reform, it was this product  
6 that caused the plant to retain its designation as a  
7 partially-regulated distributing plant.

8           Ironically, during the period of time when the  
9 plant was considered a pool supply plant, the amount of  
10 milk disposed of as route disposition and/or transferred  
11 in the form of packaged fluid milk products to other  
12 distributing plants was not able to be applied to the  
13 Section 7(c) requirements for shipments made to a  
14 distributing plant but was still considered as part of the  
15 total quantity of milk that is received at the plant, the  
16 exact same concession.

17           This is patently unfair and during the history  
18 of the Market Order in recognizing that this product  
19 satisfies an established Class 1 demand. Pre-Reform, pool  
20 manufacturing plants met performance requirements on the  
21 basis of Class 1 use or allocation of milk and the volume  
22 of a Class 1 buttermilk was therefore credited against the  
23 plant's call performance.

24           No testimony was received at the earlier

1       hearings supporting the change in this aspect of the  
2       Order. Now, however, Friendship can qualify its plant  
3       only by fulfilling someone else's need for Class 1 and  
4       Class 2 milk without receiving any credit for its own  
5       contribution to the Class 1 market before its contribution  
6       of Class 1 prices to the marketwide revenue pool.

7               It is not our intention that conventional  
8       distributing plants dedicated primarily to the production  
9       and distribution of Class 1 products, which are not fully  
10      regulated under Order 1, should become inadvertently  
11      regulated under Section 7(c) by virtue of our proposal.  
12      It appears from the data assembled by the Market  
13      Administrator that some of the partially-regulated  
14      distributing plants of this kind, identified on Exhibit 5,  
15      Pages 9 through 10 and 13 through 14 and 17 through 18,  
16      also have distribution of Class 1 products sufficient to  
17      meet the supply plant definition under a liberal reading  
18      of Friendship's proposal.

19              It is our understanding that all plants  
20      aggregated in the data on Exhibit 5, Page 61, are  
21      conventional distributing plants; that is, plants with at  
22      least 25 percent of milk receipts in the plant processed  
23      and disposed of in the form of packaged fluid milk  
24      products. These plants are not now fully regulated

1 because less than 25 percent of the total distribution is  
2 in the Northeast Marketing Area.

3 What we had in mind when we wrote Proposal 9  
4 was the conventional characteristics of a supply plant and  
5 the distributing plant as described in the beginning of  
6 USDA's Milk Marketing Order Statistics publication and in  
7 a separate website document, entitled "Quantities and  
8 Utilization of Regulation Milk". The description is as  
9 follows: distributing plants are plants primarily engaged  
10 in processing packaged fluid milk products and supply  
11 plants are plants primarily engaged in producing  
12 manufactured dairy products.

13 To exclude the possibility of the conventional  
14 distributing plant becoming fully regulated through the  
15 back door of Section 7(c) and to focus on the primary  
16 function of supply plants in manufacturing dairy products,  
17 we modify our proposal with the following clarification to  
18 be added as a new section, Subsection 7(c)(6), as follows:  
19 "6. Route distribution from the plant and transfers of  
20 packaged fluid milk described in the foregoing Sections 1,  
21 2 and 3 shall not count toward qualification as a supply  
22 plant of any plant at which less than 50 percent of the  
23 total quantity of milk physically received at the plant is  
24 used to produce Class 2, Class 3 or Class 4 products."

1           With this clarification, eliminating the  
2 possibility of dedicated distributing plants from becoming  
3 pooled as supply plants, Friendship would be the only  
4 supply plant with route disposition and transfers in the  
5 form of packaged fluid milk at distributing plants in this  
6 market.

7           Proposal 9 would restore the intent and  
8 historical practice of the Order without detriment to the  
9 pool but with substantial relief to Friendship, its dairy  
10 farmer patrons and cooperative suppliers. It is  
11 Friendship's intent that all of the supply plants route  
12 disposition be applied to Section 7(c)(1), (2) and (3)  
13 requirements whether or not the product was disposed of  
14 within the Northeast Federal Milk Market Order, just as  
15 the old call provision was interpreted to include all  
16 Class 1 milk.

17           Proposal 10. As you can tell from my  
18 testimony, I am not a big proponent of Reform or any other  
19 artificially-created changes to the Federal Market Order.  
20 This is because these changes occur overnight and are  
21 extremely disruptive to the market until all of the  
22 parties adjust.

23           One of the more onerous changes that was  
24 incorporated into the Northeast Order was the setting of a

1 fixed amount of milk that must be shipped to distributing  
2 plants in order for a supply plant to remain pooled. Pre-  
3 Reform, temporary prices resulting from the shortage of  
4 available milk to the Class 1 market was satisfied in  
5 every instance through an established process known as the  
6 "call". In fact, since every participant was aware that  
7 the Market Administrator could require them to supply milk  
8 for Class 1 use or face being depooled, there were many  
9 instances where the official process of holding a meeting  
10 to consider the appropriate level of shipments was not  
11 even necessary to create enough supply to meet the demand.

12 Why then would this amount be set at 10 and 20  
13 percent, and why would there be a need to ship milk all  
14 year-round? There was and is no shortage of milk to meet  
15 demand at distributing plants. There's no testimony heard  
16 that would indicate this amount was necessary. The truth  
17 is that these percentages were picked arbitrarily because  
18 they were cardinal numbers, not because they were  
19 systematically evaluated.

20 I understand that the Department identified the  
21 possibility that distant plants not generally associated  
22 with the Northeast Order could ride the pool. The reason  
23 for creating a performance requirement was one method to  
24 dissuade this activity. But why then would 5 and 10

1 percent not have been sufficient? This amount should have  
2 been set at the minimum level that would have accomplished  
3 the stated intent without causing any additional,  
4 unnecessary and uneconomic movement of milk by supply  
5 plants solely for the purpose of ensuring that dairy  
6 farmers have access to the local market revenue pool.  
7 After all, marketwide sharing of revenues among all  
8 producers in the milkshed is the primary objective of the  
9 Federal Milk Marketing Order Program. This objective is  
10 defeated when the performance rules by design or in effect  
11 result in (a) the exclusion of some producers from the  
12 pool or (b) producers without access to a Class 1 outlet  
13 having to buy market access from those who dominate the  
14 market's Class 1 milk supply or (c) in shipments of  
15 unneeded milk over long distances for the sole purpose of  
16 performance, resulting in displacement of other milk  
17 supplying Class 1 plants that must then be shipped for  
18 manufacturing uses and additional transportation costs.

19 The reasoning in support of Proposals 3, 5 and  
20 6, which we really haven't gotten into here yet but which  
21 I understand that the way the proposals were submitted,  
22 indicates that while 10 and 20 percent requirements may  
23 not have been sufficient to create a disincentive to  
24 distant pool plants, increasing this amount would not have

1       been more effective nor would decreasing it have been less  
2       effective.

3               We believe that now is the appropriate time to  
4       adjust these percentages to a more reasonable and less  
5       market-distorting amount of 5 and 10 percent.  
6       Furthermore, if any of the proposals of 3, 5 and 6 are  
7       adopted, it is our testimony that the Department  
8       absolutely must not pass up this opportunity to adjust the  
9       percentages used in 1001.7(c) downward in an effort to  
10      reduce the burden on plants that should be associated with  
11      and create value for the pool, such as ours.

12             A simple analysis of the data provided by the  
13      Market Administrator postulates that reducing these  
14      percentages as we have proposed would have an  
15      insignificant effect, especially if any of Proposals 3, 5  
16      or 6 were adopted in one form or another. However, if  
17      there is ever a need to increase the amounts to  
18      accommodate a milk shortage, the Market Administrator  
19      still retains the authority as granted in Section  
20      1001.7(g) to consider and make such adjustments.

21             Thank you for the opportunity to address the  
22      Department and all assembled here today.

23             Q     Do you have any additional comments you wish to  
24      make here this morning?

1           A     Not at this time.

2           MR. ENGLISH:   The witness is available.

3           JUDGE BAKER:   Very well.   Are there any  
4 questions?   Yes, Mr. Beshore.

5                           CROSS EXAMINATION

6           BY MR. BESHORE:

7           Q     Good morning, Warren.

8           A     Good morning, Marvin.

9           Q     Let me go to Proposal 10 first, if we can.   One  
10 of your comments -- actually, let me go to your -- one of  
11 your comments towards the end of your statement intrigued  
12 me, and I wonder if you can elaborate on it.

13                    You indicate that you are opposing Proposals 3,  
14 5 and 6 because they would place a burden on your plant,  
15 such as yours, which create value for the pool.  
16 Such as ours, which creates value for the pool.   Towards  
17 the bottom of Page 6, the next-to-last.   Third-to-the-last  
18 paragraph.   Do you see that?

19           A     Actually, I don't believe that I opposed in my  
20 statement 3, 5 and 6.

21           Q     Oh.   Are you supporting?

22           A     No.   I -- I've made no judgment on 3, 5 and 6  
23 at this point, but what I am saying is that if any of  
24 those additional performance requirements are adopted,

1 that those performance requirements could take the place  
2 of some of the shipping and -- shipping performance  
3 requirements.

4 Q Okay. Well, the statement that I was really  
5 intrigued about was that they -- that would burden the  
6 plants that create value for the pool such as yours.  
7 What's your Class 1 utilization?

8 A The Class 1 utilization? Well, that all  
9 depends. Based upon the total plant receipts or our  
10 independent patron receipts?

11 Q Based upon total plant receipts. In other  
12 words, you look at your total, you know, your total  
13 manufacturing operations, your total operations at your  
14 plant in Friendship, what proportion of them are  
15 production of Class 1 products?

16 A Combined Class 1 and Class 2 runs about 70  
17 percent. However, strictly Class 1 is about 1.5 to 2  
18 percent.

19 Q Okay. Now, in a 40 to 45 percent Class 1  
20 market, in what sense does that utilization enhance value  
21 to the pool?

22 A Well, I believe you're improperly  
23 characterizing my statement to mean that I said that Class  
24 -- my Class 1 adds substantially to the pool. However,

1 the combination of Class 1 and Class 2 use does add  
2 substantially to the pool. As you know, there's a 70  
3 percent premium or differential on Class 2 milk, and if  
4 our plant wasn't there processing such significant amounts  
5 of Class 2 milk into cottage cheese and sour cream and  
6 yogurt, it's likely you'll go seven miles down the road  
7 and it becomes Class 3 product at a non-pool plant.

8 Q So, are you saying that in order to pay your  
9 independent producers, you blend price, producer price  
10 differential as it's now described in the Order, that your  
11 -- your plant utilization and plant accountability is  
12 above that price?

13 A Yes, I think it most definitely is. I believe  
14 from the rough calculations I made shortly before coming  
15 down here, we actually have a net pool obligation and have  
16 had the pool the last three months and then several other  
17 months on beyond that, but we've actually had a net pool  
18 obligation for a significant amount of time since Reform.

19 Q Why do you want to be part of the pool?  
20 Since it costs you money every month, you have a net pool  
21 obligation, you are better off being unpooled, wouldn't  
22 you?

23 A In certain months, we would be better off being  
24 non-pooled. It goes back and forth. Right now, we don't

1 really have a choice. Our milk is pooled, with a certain  
2 portion of it going in Class 1 which is partially  
3 regulated, so it must be pooled, and there are other  
4 factors that also include reliability of supply that  
5 factor into being associated with the pool.

6 Q Okay. I understand your 1 and 2 percent Class  
7 1 has got to be partially regulated to the extent that  
8 it's distributed in a federal milk order area, which I  
9 gather it's not all distributed in Order 1, correct?

10 A That's correct.

11 Q What other Orders do you distribute it to?

12 A I believe we're down in the Southeast Orders.  
13 That's all I can think of off the top of my head of any  
14 significant quantities. We do ship some product down to,  
15 I believe, the unregulated area in Western New York and  
16 other areas, but it's mainly Atlanta, Southeast Florida  
17 and those areas.

18 Q Okay. So, your milk is being pooled, I take  
19 it, primarily to hedge the months when you will draw from  
20 the pool on your -- be able to draw from the pool and pay  
21 your producers the pool price when your utilization value  
22 of Class 3, not Class 2, 1 percent Class 1 and the rest  
23 Class 3 or 4, I guess, is to hedge so that during the  
24 withdrawal out of the pool, when your utilization value is

1 less than one class?

2 A It works as a hedge, yes.

3 Q Okay. Now, your -- in order to, you know,  
4 obtain that -- that hedge for your plant, you're proposing  
5 in Proposal 10 that in a market where you have 40-45  
6 percent Class 1, any supply plant operator should be able  
7 to pool his milk with a minimum of 5 percent shipment to a  
8 distributing plant, correct?

9 A Correct.

10 Q And for shipping 5 percent, you would be able  
11 to draw from the pool enough money to pay your producers  
12 the 40-45 percent blend price for the pool?

13 A So long as his plant or his milk supply  
14 continues to act as a reserve for the market area, yes, I  
15 believe that to be correct.

16 Q Well, the -- the -- we're talking about what --  
17 what's requiring someone to be -- to qualify for that  
18 blend price which is, you know, the milk in the pool,  
19 correct, and you're saying it should be 5 percent?

20 A That's correct.

21 Q When you say so long as it acts as a reserve,  
22 by that I take it, you just mean so long as it ships more  
23 if it's ordered to ship more by the Market Administrator  
24 with an increase in the percentages, a discretionary

1 increase, correct?

2 A That's one of the many, many aspects of  
3 participating. Some of the other aspects are the fact  
4 that they are there to balance, to take the milk when it's  
5 not necessary for Class 1 use, and to dispose of it at  
6 that time.

7 Q To take what -- what milk?

8 A Well, whatever milk is being received at that  
9 plant that could be shipped, if necessary, to Class 1  
10 distributing plants. The time that those distributing  
11 plants do not need that milk, that plant is available to  
12 process that milk and assist in the orderly marketing of  
13 milk.

14 Q But prior to your -- your processing of  
15 perishable -- primarily, it's 7 percent in the Class 1 are  
16 perishable products, are they not?

17 A My products, yes. You -- you just asked me a  
18 theoretical question about other plants.

19 Q Okay.

20 A I'm more concerned with myself.

21 Q Okay. That's what I thought I was asking  
22 about. For you, under your proposals you support, for you  
23 to obtain a pool plant and obtain blend price every month  
24 by shipping 5 percent, the additional obligations that you

1 propose to add to the pool are to increase that percentage  
2 if called upon by the Market Administrator, correct?

3 A Yes. That's been in place for in excess of 40  
4 years, and we have agreed at previous hearings, previous  
5 called hearings or meetings, that is a reasonable  
6 expectation of supply plants.

7 Q Actually, for most of that time, it's been zero  
8 requirement, right?

9 A That is correct.

10 Q You are proposing that under Proposal 10, that  
11 there be a zero percent requirement in the months of  
12 January through July. Is it January through July?

13 A No. Actually, I didn't address January through  
14 July at all. I was just addressing the 10 and 20 percent  
15 that was required to be shipped during the month of August  
16 through December.

17 Q Okay. I misspoke. So, presently, there's a  
18 zero requirement during January through July. Do you  
19 support the retention of that zero requirement?

20 A Where do you see the Order says zero percent?  
21 I -- I don't see that at all. I -- I see it as they say  
22 that if you perform at the required levels from August, I  
23 believe it's August, through December, --

24 Q Correct.

1           A     -- that you then don't need to continue to  
2 perform during the period of the year when there is excess  
3 milk and that's as any reasonable person would arrange it,  
4 that if you perform during the Fall when it's really  
5 needed, you don't have to perform just for the sake of  
6 performing during the rest of the year. However, if you  
7 do not perform when it is critical to the Market Order,  
8 then you would have to do something in addition to that or  
9 instead of that and that is the 10 percent during January  
10 through July 30th.

11           Q     You understand that the market, during January  
12 through July, continues to need approximately 40 percent  
13 of its milk in the pool for Class 1 use, do you not?

14           A     Sure. It just doesn't need it to be shipped  
15 from supply plants. There are more economic sources for  
16 that milk.

17           Q     Such as removing it from the cooperative plants  
18 and supplying it to the Class 1?

19           A     Right. Marvin, that's one of thousands or  
20 maybe probably one of 65 or 64 different options that can  
21 happen.

22           Q     Milk's got to -- the Class 1 milk, if we have  
23 40 percent in the pool and the supply plants aren't  
24 supplying any, and your obligation is to supply any, then

1 the rest of the market's got to supply more than 20  
2 percent, does it not, to get the same blend price that the  
3 zero percent supply plants are getting, correct?

4 A Would you restate that?

5 Q If you've got a market that's got 40 percent  
6 Class 1 utilization and the supply plants have a zero  
7 percent obligation to deliver, in order to get to the  
8 market average of 40 percent utilization, somebody, namely  
9 the non-supply plant part of the market, is going to have  
10 to be providing in excess of 40 percent to get the market  
11 to 40 percent, correct?

12 A That's correct, but that amount can come from a  
13 myriad of other sources. It's not -- it's not an absolute  
14 that that needs to come from a cooperative butter powder  
15 plant.

16 Q Okay.

17 A All right. It can come from many other supply  
18 plants, maybe a supply plant in Minnesota that comes into  
19 the Order in March, and they would provide some amount of  
20 milk for distributing plants.

21 Q Do you think that's how the Secretary wanted to  
22 refashion Order 1 here, have zero requirements for supply  
23 plants during the January through July period, so that  
24 milk can be imported from those?

1           A     No.  If that were my suggestion, I would have  
2 proposed it.  I -- I haven't addressed the January through  
3 July period at all in any of my proposals.

4           Q     Are you -- do you oppose the portion of  
5 Proposal 5 which would revise the requirements for pool  
6 supply plants to require the 10 percent shipment for each  
7 month January through July?

8           A     I haven't analyzed it.

9           Q     Okay.  So, you have no position on that?

10          A     That's correct.

11          Q     Do you have a position with respect to the  
12 portion of Proposal 5 which would eliminate the split  
13 plant, so-called split plant provisions in Order 1?

14          A     I haven't analyzed it.  I have no position on  
15 that.

16          Q     Your plant's not a split plant, right?

17          A     That's correct.

18          Q     Now, let me just talk about Proposals 8 and 9 a  
19 little bit.  Let's talk about 9 first, I guess.  It's your  
20 -- it's your suggestion in Proposal 9 that your Class 1,  
21 which is considered in the Southeast or outside the  
22 Marketing Area, that they be considered part of your --  
23 your performance for whatever requirements there are in --  
24 for a supply plant, correct?

1           A     Yes, just as now shipping to a distributing  
2     plant, I don't believe that there's any limitation on  
3     where the distributing plant is located, whether it's in  
4     Order 1 or outside of the Order, so long as you're  
5     shipping to a distributing plant that qualifies as a  
6     supply plant in the current regulations.

7           Q     But the distributing plants in the Order must  
8     have 25 percent of them, I think that's the right  
9     percentage, of their fluid milk products distributed in  
10    the Northeast Marketing Area, correct?

11          A     Yeah. I believe it's 25 percent of the total  
12    receipts processed in the Class 1 and 25 percent of that  
13    is route disposition in the market area.

14          Q     Do -- do you buy any packaged product from  
15    other -- other distributors and then, you know,  
16    redistribute it from your plant?

17          A     By packaged product, I'm going to interpret  
18    you're --

19          Q     Class 1.

20          A     -- referring to Class 1.

21          Q     Class 1.

22          A     And the answer to that is no, we do not  
23    purchase packaged fluid milk products and redistribute  
24    them at this time.

1           Q     As Proposal 9 is written, -- what's your  
2     intention with respect to Proposal 9, if you did purchase  
3     packaged Class 1 products and then would move them on from  
4     your plant on routes?  Would you propose that that's --  
5     that those volumes be considered performance by your plant  
6     under the Order?

7           A     No.

8           Q     Okay.  So, you would only propose to consider  
9     Class 1 products that you packaged at your plant?

10          A     Correct.

11          Q     Okay.  Now, let's go to Proposal 8.  Basically,  
12     the bottom line of Proposal 8 is that you want to  
13     reformulate the denominator of performance equations so  
14     that you would qualify as a supply plant with less total  
15     shipments to distributing plants than are required under  
16     the present Order, correct?

17          A     Yes.

18          Q     Given your present -- let's put it this way.  
19     If -- what percentage -- if you're -- if Proposal 8 were  
20     adopted, what percentage would the required shipments from  
21     your plant be under Proposal 8, if you compared that to  
22     the present denominator language in the Order?  Do you  
23     follow me on that?

24          A     Yeah.  I do.

1 Q Do you understand the question?

2 A Yeah. Actually, you know, if we can read  
3 between the lines, the calculation beginning on Page 2  
4 fairly represents the story.

5 Q Okay. So, you presently -- you'd have roughly  
6 25 million total --

7 A No.

8 Q Total milk supply of 15 million --

9 A It's 15 million and that would reduce the  
10 denominator, to move things along here, from 15 million to  
11 10 million.

12 Q All right.

13 A Approximately.

14 Q Okay. So, the two million -- so that you could  
15 then qualify the shipments of two million?

16 A That is correct. Continue to perform as we had  
17 been required for many years or at least it was inferred  
18 that we would perform for many years.

19 Q And that's what percentage of the 15 million?

20 A Pardon me? What --

21 Q Two million is what percentage of 15 million?

22 A Two million is what percentage of 15 million?  
23 It's somewhere in the neighborhood of 7 or 8 percent,  
24 isn't it? So, still a pretty significant amount. It's

1 nothing to be winked at.

2 Q Do you have the -- when you're looking at -- in  
3 the circumstances of having a net pool obligation to the  
4 Order, have you ever happened to depool your plant?

5 A Our plant is currently not a supply plant.

6 Q Do you intend to have the -- the prerogative to  
7 depool your plant if it is a supply plant whenever you  
8 have a net pool obligation to the former?

9 A There -- and I forget as I'm sitting here, I  
10 forget the section of the Order, but it's very specific as  
11 to when you depool -- actually, it's not so much the plant  
12 as it is the independent milk supply. When you depool the  
13 plant and therefore the producers, you know, unless they  
14 have some association with the cooperative or some other  
15 handler, as to when those producers get back on, and I  
16 think as a reasonable businessman, you would expect and we  
17 do perform a calculation, a risk-benefit, as to if we were  
18 to depool today to save money, what -- what would that  
19 mean before we were able to get back on the pool, and it  
20 would have to be a fairly convincing savings or cost  
21 advantage to us to take that risk and depool now, not  
22 knowing what was going to happen in the future months.

23 Q You're referring to the Dairy Farmer Program,  
24 what's called the Dairy Farmer Program, one of the market

1 provisions in the Order?

2 A Yes, and that actually was one of the -- one of  
3 the issues identified that resulted in us making Proposal  
4 11 and then withdrawing it.

5 Q Okay. Now, let's look at the combination of  
6 Proposals 8 and 9. Proposal 8, I think, the denominator  
7 reduces the present requirement from an effective 10  
8 percent to an effective 7 or 8 percent, and Proposal 9  
9 then reduces the percentage from 10 percent to 5 percent.  
10 The two together would reduce the present performance  
11 requirement from 10 percent to 3 or 4 percent comparing  
12 apples to apples. Are you with me?

13 A Well, you lost me with the exact percentages,  
14 but it would, for Friendship Dairies, reduce the  
15 performance requirements so that we would have a realistic  
16 chance of continuing to pool in Market Order 1 as an  
17 independent operator. That's the full intent of us for 8,  
18 9 and 10. We're not proposing this to help or to hurt  
19 anybody else. This is strictly for Friendship Dairies.

20 Q I understand. And to accommodate Friendship  
21 Dairy, the effective performance requirements under the  
22 Order which are presently 10 percent would be reduced by  
23 changing the denominator in that equation, that ratio, in  
24 Proposal 8 so that it went down to 7 or 8 percent, you

1       calculated, to two of the 15, 7 or 8 percent, correct?  
2       And then if you reduce that to 5 percent, it would just  
3       then -- you'd only be required to have one million  
4       deliveries and therefore it would be one of the 15,  
5       correct?

6             A       The amount of milk that Friendship would  
7       deliver to distributing plants would not change. The  
8       amount that we're currently delivering, the amount that we  
9       would deliver on these proposals would not change.

10            Q       Okay. You're currently a non-pool plant?

11            A       That's correct.

12            Q       So, you don't have to deliver anything?

13            A       Our producers still have to perform in the  
14       marketplace, and we are performing. Friendship Dairy's  
15       plant is not performing that, but the producers are.

16            Q       Okay. So, if nothing would change, why do we  
17       need the proposals?

18            A       Because right now, Friendship Dairies is not  
19       operating the pool plant, and we're relying on our  
20       cooperative supply partners to provide that service to us,  
21       and they have been very cordial and have done that, and we  
22       would still like the opportunity to once again pool our  
23       plant as it was for the past 40 some odd years.

24            Q       Was Friendship a -- the Market Administrator's

1 information in the proposal, Exhibit 5, Page 8, indicates  
2 that Friendship was a pool supply plant during January  
3 through September 2000, is that correct?

4 A Yeah. I'm not sure of the exact dates, but  
5 that sounds correct.

6 Q Well, the first -- the first year -- for the  
7 first seven months, you were grandfathered, so to speak,  
8 under the old provisions and as somebody testified earlier  
9 in the hearing, you were able to retain your full status  
10 for January through July 2000 without any shipments under  
11 the new regulations, correct?

12 A That's correct.

13 Q But you remained a pool plant during August and  
14 September of 2000. Do you recall that?

15 A Yes, I do.

16 Q Okay. And -- and which I take it to mean that  
17 you delivered the required 10 percent of your -- your  
18 plant supply as -- as Friendship Dairy in order to qualify  
19 in August of 2000, correct?

20 A Correct.

21 Q And in September of 2000, you also delivered  
22 the 20 percent required as Friendship Dairy as an  
23 independent supply plant to the pool in the Order,  
24 correct?

1           A     Correct.

2           Q     Thank you, Warren.

3           MR. BESHORE:   That's all I have.

4           JUDGE BAKER:   Thank you, Mr. Beshore.

5           Yes, Mr. English?

6           THE WITNESS:   Before Chuck gets started, can I  
7     make one correction? I misspoke in answering some of your  
8     questions or at least one of them. When I said that I --  
9     my proposal did not address the January through July  
10    shipping requirements, my proposal in fact did address  
11    that by changing the required shipping amount from 10  
12    percent to 5 percent. In other words, I'm correcting --  
13    when I said it didn't affect that at all, it did. It  
14    still kept that in as a requirement but lowered the amount  
15    from 10 to 5 percent.

16          BY MR. BESHORE:

17          Q     Unless you had been pooled in the prior August  
18    to December and then it retains it at zero?

19          A     That's correct.

20          MR. BESHORE:   Okay.

21                         REDIRECT EXAMINATION

22          BY MR. ENGLISH:

23          Q     Mr. Schanback, are there times when a portion  
24    or all of your independent supply is associated with the

1 cooperative and ends up being pooled on the Order as 9-C  
2 milk?

3 A I believe so, yes.

4 Q When that happens, does a portion or all of  
5 that 9-C milk remain at your plant?

6 A I'm not sure. Is the 9-C milk that you're  
7 referring to, is it the Friendship producer milk?

8 Q The Friendship producer independent supply  
9 which, in answer to my previous question, you indicated  
10 was associated with the cooperative at some point in time  
11 is pooled as 9-C milk, is any portion of that 9-C milk  
12 received at your plant?

13 A Yes. I -- I would have to, in response to your  
14 prior question, say that the majority of it typically  
15 remains at the Friendship facility. That's the Friendship  
16 independent milk supply.

17 MR. ENGLISH: Thank you. No other questions.

18 JUDGE BAKER: Thank you.

19 Are there other questions for Mr. Schanback?

20 Yes, Mr. Tosi?

21 RE CROSS EXAMINATION

22 BY MR. TOSI:

23 Q Mr. Schanback, I'm confused by your testimony  
24 with -- for example, on Page 2 in the first full

1 paragraph, where you say that the "newly-required  
2 shipments under the Order merely displaces local milk that  
3 had previously been supplied to distributing plants."

4 I'm confused by what -- what milk is being  
5 displaced and which is the milk that has been displaced in  
6 whatever is being displaced?

7 A The situation that I was attempting to describe  
8 was the fact that the changes to the Market Order did not  
9 create any additional Class 1 demand by the consumer.  
10 Therefore, the amount of milk that was required to be  
11 shipped by supply plants to the distributing plants,  
12 because that milk wasn't processed, packaged and then  
13 dumped, if that milk that I ship was packaged and sold to  
14 the consumers, that meant that some other amount of milk  
15 that had been supplying those consumers the day before was  
16 now having to find a home some place else, to be processed  
17 by some other facility, pass within that facility into  
18 other products in order to consume it.

19 Q All right. Under the old New York/New Jersey  
20 Order, were you a temporary pool plant or a designated  
21 pool plant?

22 A We were a designated pool plant.

23 Q And what was the performance standards for --  
24 under the old Order for being designated a pool plant?

1           A     Monthly. I think if you're referring to the  
2     mandatory shipping requirements, there weren't any written  
3     into the Order, but there was a call provision that for  
4     many years was a non-issue. There was no call. Pool  
5     plants. What about processing the milk? Then there  
6     became a time when it became quite regular, that every  
7     Fall, there was a call hearing that we needed to perform.

8           Q     And when there was a suggestion of a call, was  
9     your dairy one of the dairies that voluntarily shipped  
10    milk then?

11          A     Yes, and in fact, it -- it occurred even long  
12    before there was a suggestion of a call. When -- when it  
13    became apparent that this was the reality of the  
14    marketplace, that we would need to supply milk every Fall  
15    and that was a shift in paradigm from what had happened  
16    before then, we as prudent businessmen arranged supply  
17    contracts wherein we were supplying fluid cars to the  
18    Class 1 marketplace, and in fact, because of the distant  
19    location of our plant and the type of producers and the  
20    size of the producers, the location of the producers, we  
21    determined that in order to do it economically, there  
22    needed to be some manner in which we provided added value  
23    to the Class 1 customer.

24                    So, in fact, what we were doing was we were

1 supplying skim milk to Class 1 customers and that helped  
2 us provide the extra value that would give us some  
3 reasonable payback for our expenses.

4 Q Absent the call, a condition for being pooled  
5 under the old New York/New Jersey, provided you were a  
6 designated pool plant, it required no specific performance  
7 requirements?

8 A Other than responding to a call if it were  
9 necessary, but there was absolutely nothing written into  
10 the Order that required mandatory shipments in any  
11 particular month.

12 Q During those months in which there were no  
13 calls and therefore no specific requirement for pooling,  
14 did -- did you regularly ship to Class 1 handlers?

15 A Yes. We had -- this was back in my early days  
16 in milk supply and procurement, we began with a one-year  
17 contract and we had a three-year contract and eventually a  
18 five-year contract providing milk to Class 1 bottlers.

19 Q And has this been a month-in/month-out thing up  
20 until Order Reform?

21 A No. This was an on-going process. This was  
22 something that we had for close to 10 years on an on-going  
23 basis, and it was steady throughout the year, and in  
24 addition to that, we -- we worked with our customer to

1 tailor deliveries, to tailor quantities. There were times  
2 when they would request additional milk. So, we would  
3 provide it to them at the contract price. So, those are  
4 an on-going business relationship that we had developed  
5 outside of the requirements of the Market Order.

6 Q Okay. How should the Secretary reconcile the  
7 testimony from the organization that represents Class 1  
8 handlers in the Northeast, specifically, for example, the  
9 New York State Dairy Foods, if we put on witnesses that  
10 are saying that they would like to see the performance  
11 standard increase while at the same time, you're asking  
12 for a decrease? I would imagine and the testimony  
13 suggested that the reason they're asking for an increase  
14 is that they need more surety to be able to attain an  
15 adequate supply of milk, and to the extent that they're  
16 responding to customer demand that -- how would you  
17 reconcile that with people that actually need the milk,  
18 coming and testifying that actually need the milk and then  
19 for somebody else to come and say we need to lower it  
20 because Order Reform affects me in such a way that I can't  
21 -- and my producers to blend all the time?

22 A Well, you're asking me how I would reconcile  
23 it, and what I would do is I would tell the people who  
24 were represented by New York State Dairy Foods that they

1 need to wake up and realize that this has been going on  
2 for as many years as the -- that people have been drinking  
3 milk and that every Fall, you need more milk than you did  
4 in the springtime, and as prudent businessmen, you need to  
5 plan ahead and to anticipate the fact that you're going to  
6 need that milk and arrange with a supplier of milk, be  
7 that an independent or a cooperative, to supply that milk.  
8 Basically get your head out of the Dark Ages.

9 Q All right. Why do you need to be pooled as a  
10 condition of being able to pay your producers the blend  
11 price?

12 A I actually don't need to be pooled to do that  
13 on a temporary basis, but over a long term, I do need it  
14 because there are times when the value of Class 2 products  
15 is less relative to the value of all the other products  
16 that fall under the blend price, that I'm not able to  
17 demand the price high enough from my customers to return a  
18 reasonable price to my producers and keep that business  
19 day in and day out. I could do it for a short period of  
20 time. I could probably do it for several years, but  
21 eventually that imbalance in the values of the milk would  
22 cause me to cease operation, therefore creating  
23 uncertainty in the marketplace and disorderly marketing.  
24 Really, it would be just another plant in Western New York

1 that shuttered its doors, much like Carnation or Charlapse  
2 or many of the other plants that are coming off the Order  
3 now.

4 Q By long term, you mean a year?

5 A I -- I -- I would say that over time, the value  
6 of the milk remains fairly constant, if you were to take  
7 year snapshots. So, yes, I would -- I would say in a  
8 year's time. Again, a lot depends upon the -- I would say  
9 that the variation in the values of milk. It's not so  
10 much that, you know, Class 2 is low or Class 2 is high,  
11 but relative to what is it higher or lower.

12 Q Do you divert milk?

13 A No.

14 Q You may have answered this with Mr. Beshore,  
15 but I'm not sure that I understood your answer. If the  
16 Class 1 use in the Northeast is in the 40 percent plus  
17 range, what's unreasonable about the existing performance  
18 standards that are what they are, significantly lower than  
19 40 percent? One could look at those numbers and perhaps  
20 conclude that it's kind of easy to pool here or it's kind  
21 of easy to perform and therefore have my milk be pooled  
22 here in the Northeast.

23 A Well, in comparison to the 40 percent, that  
24 becomes more of a philosophical question as to where

1       should that 40 percent come from. Should it come from the  
2       most economical source of the milk, which would be  
3       relatively close to the plant where it's consumed, or  
4       should it come from more distant plants? If I were going  
5       to fashion a market order, it would be such that the  
6       plants which are in a more economical location to supply  
7       milk would be the first ones that were called upon to  
8       supply the milk and then only in a decreasing amount as we  
9       got further and further away would the more distant plants  
10      be required to supply milk.

11           Q     Okay. Have you ever asked the Market  
12      Administrator -- excuse me. To the extent that the Order  
13      currently provides authority to the Market Administrator  
14      to adjust the performance standards for pooling, have you  
15      asked or have you ever submitted a request to ask that to  
16      be adjusted?

17           A     Yes. On at least two occasions that I can  
18      recall, we have made formal requests to reduce the  
19      shipping requirements.

20           Q     And I assume that it was turned down?

21           A     It wasn't turned down out of hand. I think he  
22      did a thorough investigation and it was his determination  
23      that it was not appropriate at the time.

24           Q     Okay. In that regard then, your request to

1 have it lowered was -- was --

2 A Eventually approved.

3 Q Okay. And to the extent that we're going to  
4 have testimony -- that we have testimony so far that  
5 suggests that the standard should be even higher and the  
6 Market Administrator still has the authority to adjust  
7 those, that in itself sort of suggests that maybe, you  
8 know, the current numbers and the current standards still  
9 were not adequately high enough.

10 A Well, that's one interpretation that's  
11 suggested. I hold my interpretation to have greater value  
12 and that is, is the Class 1 processors would love to have  
13 100 percent participation. They would like it to be as  
14 high as they can and use that stick to reduce the premiums  
15 that they need to pay in order to acquire that milk.

16 Q If we adopted your proposal and lowered the  
17 performance standard to -- to the numbers that you  
18 indicated, and then Class 1 handlers came in and asked the  
19 Market Administrator to adjust these numbers up  
20 significantly, and to the extent that the Order serves as  
21 the mechanism to make sure that the market's adequately  
22 supplied with Class 1 milk, and the Market Administrator's  
23 determination would be such that 5 percent, for example,  
24 shipping requirement isn't enough, aren't you back to the

1 same situation that we're facing right now?

2 A Well, from everything I've seen, the Market  
3 Administrator has done an outstanding job interpreting as  
4 much information as he has. He has the ability to reduce  
5 it. However, since this has become institutionalized, the  
6 processors, Class 1 processors have become, for lack of a  
7 better description, they've become lazy and have decided  
8 that they don't need to work for that 10 percent. They  
9 don't need to return a price to the marketplace to move  
10 that milk to Class 1, and they -- they are actually back  
11 in the same place.

12 If the Market Administrator did, I would think  
13 that just as he has moved them up on a temporary basis,  
14 under the current terms, he would move them up for a  
15 temporary basis at a later point. So, lowering  
16 -- lowering the basis on which we begin would give most of  
17 the participants time to adjust and they'd probably come  
18 back with the same thing, calling in every Fall and saying  
19 we need more milk, institute the so-called call, but it  
20 would now be on a lesser amount of milk. and I think the  
21 producers, dairy farmers, in this marketplace would  
22 benefit from that because they would be getting more of  
23 the true value from Class 1 milk in the Fall months.

24 MR. TOSI: That's all I have. Thank you very

1 much.

2 JUDGE BAKER: Thank you, Mr. Tosi.

3 Are there other questions for Mr. Schanback?

4 Yes, Mr. Vetne?

5 RECROSS EXAMINATION

6 BY MR. VETNE:

7 Q You responded to a question from Marv Beshore  
8 that pooling of your producers works as a hedge. I think  
9 the question that generated that response was, isn't your  
10 primary reason to be pooled that you will have a hedge.  
11 Maybe I'm a little bit disconnected between the question  
12 and the answer. So, I asked you about your reasons for --  
13 for being pooled and some of these were addressed by Gino  
14 Tosi and others.

15 Not being pooled, you sometimes have a milk use  
16 of your producer milk that's greater than the blend in  
17 your area and sometimes lower, correct?

18 A Correct.

19 Q Not being pooled then would provide to your  
20 producers, the dairy farm patrons and cooperatives, for  
21 that matter, greater price instability, less price  
22 predictability, than to their neighbors who are able to  
23 participate in the pool, correct?

24 A Correct.

1           Q     And one of your objectives is to provide this  
2 same price stability to your patrons as their neighbors  
3 enjoy, correct?

4           A     Correct. Stability is -- is essential.

5           Q     And comparability between farms, that's also  
6 important, isn't it?

7           A     Yes. That's quite essential.

8           Q     And yesterday or maybe it was prior -- is this  
9 Tuesday? Well, there was testimony on the proposal which  
10 referred to the excess milk and so forth, and the  
11 observation was made that it would be disorderly to have  
12 excess milk out there that doesn't have pooled access  
13 because that would depress the blend price for all  
14 producers.

15                     With that referenced and I think you referenced  
16 it, too, if you weren't able to provide a home for your --  
17 for that milk, that milk would be competing for other pool  
18 sources, wouldn't it?

19           A     Yes, it would.

20           Q     And that would have a depressing -- I think you  
21 referred to cubic cheese as an example, that it would go  
22 some place or try to find some place?

23           A     Yes.

24           Q     And -- and it would try to find some place that

1 is a pool outlet, correct?

2 A That's correct.

3 Q Because that's the competitive incentive for  
4 dairy farmers?

5 A That is correct.

6 Q You said you have no incentive and then  
7 corrected it, that you have no position on Proposal Number  
8 5 to require shipments of 10 percent January -- yeah --  
9 January through August, whatever it might be. You -- you  
10 did have a position on what the shipment requirements  
11 should be during those months, correct?

12 A Yes, I did.

13 Q And so, you didn't intend to imply that you are  
14 indifferent to whether it should be 10 percent or not,  
15 correct?

16 A That is correct. What I tried to explain  
17 during that break between Marvin's and Chuck's  
18 questioning, that I believe that the amount as written  
19 into the Order, currently 10 percent should be reduced to  
20 5 percent.

21 Q Which then you didn't have a current position  
22 on, but you might brief, is whether there should be  
23 elimination of the automatic qualification months?

24 A I -- I did not directly study that, but in the

1 statement, I believe I said that part of our objection is  
2 the overnight changes that come about when the Market  
3 Order is rewritten, and it's been what, 20-30 months at  
4 this point. We've barely become adjusted to the post-  
5 Reform, and here we are once again making additional  
6 changes. I don't think that such drastic changes need to  
7 be made. I think that for the most part, the Market Order  
8 and the market economics are balancing the market  
9 adequately. I don't think that there's any emergencies.  
10 I don't think that there's any severe shortage of milk. I  
11 don't think that anyone is suffering unnecessarily now  
12 from something that happened overnight, and as I  
13 understand it, you know, it doesn't really pertain to me  
14 directly, but the changes or the Proponents' Proposals 5  
15 and 6 or 3, -- 2, 3, 4, 5 and 6, all of the pooling  
16 provisions, are attempting to fix a problem of distant  
17 plants, distant entities pooling on this Order and drawing  
18 money that really belongs in the Northeast dairy farmers'  
19 pocket to their pockets, and I think that there are many  
20 more effective ways to solve that problem than to adjust  
21 these performance requirements because performance  
22 requirements involve everybody.

23 You can have a small group that is creating  
24 this problem. It's far better to address that small group

1 head on than to make everybody suffer and then, in my  
2 opinion, still not correcting the problem. You're just --  
3 you're shading it a darker color, so that they have less  
4 incentive, but you're doing that on the backs of all of  
5 the other people who are performing a service and  
6 performing as per the letter of the Market Order. You'd  
7 be far better off doing something specific, and off the  
8 top of my head, maybe if those distant plants are pooling  
9 and the Secretary decides that that's inappropriate, that  
10 there would be some other work around, perhaps a distance  
11 differential, that the further you go and the fewer months  
12 of the year that you supply this market, the more you have  
13 to supply. There should be an overall target.

14 You're going to pool a 100 million pounds and  
15 you gotta provide 20 million pounds in the Class 1 market,  
16 and I'm just thinking of other solutions. I'm sure the  
17 Department in its wisdom could solve that problem through  
18 a better mechanism than what's being proposed by Acme and  
19 New York State Dairy Producers.

20 Q One of the changes that came as a result of  
21 Federal Order Reform was flat pricing and the milk that is  
22 very distant from the market is no longer adjusted at the  
23 producer's end of the transaction by its value relative to  
24 the market that it's associated with?

1           A     Yes.  That was an ingenious solution.  
2     Unfortunately, we're beginning to find out that there are  
3     many other minor problems with that.  I think the grand  
4     scheme of things, it worked fairly well, but it  
5     -- it's still suffering some abuses in certain instances.

6           Q     Okay.  But a result is that -- that producer  
7     milk located distant to the market is -- is credited with  
8     greater value than it actually has to the market?

9           A     Yes.

10          Q     And if the Secretary had the authority and the  
11     willingness to adjust producer prices without Class 1  
12     prices, that would be one way to address this -- the  
13     outside milk problem, correct?

14          A     Correct.

15          Q     And it would address it without requiring  
16     inside milk to ship all over the place in trucks and  
17     displace milk at greater efficiency, correct?

18          A     That's correct.  I think one of the earlier  
19     witnesses phrased it quite well when he said that as it's  
20     proposed, it doesn't work.  There are other solutions.  I  
21     just know that these aren't the best solutions, the ones  
22     that are being proposed.

23          Q     In the past when there was pre-Reform, the  
24     observation was made and you agreed with it that for most

1 of the time, there was zero shipping requirements, --

2 A Correct.

3 Q -- correct? And I think the question was asked  
4 as though that's a bad thing. But when there was no call  
5 shipping requirements, it was because there was no need,  
6 is that correct?

7 A That's correct.

8 Q And you shipped milk when it was needed, when  
9 the Market Administrator held hearings in response to  
10 complaints that there wasn't a need?

11 A That's correct.

12 Q I -- I'm thinking how sad it is that I'm saying  
13 back in the good old days, the operators really understood  
14 their business much better and planned ahead. Do you  
15 believe that your producer in the market is served in any  
16 way by making milk ship when it's not needed?

17 A No. It's actually a great disservice to the  
18 dairy farmer because we in general, handlers in general,  
19 are then incurring costs that actually are coming out of  
20 somebody's pocket. The handling costs, the shipping  
21 costs, that's all money that has to come from some place  
22 and ultimately it either comes from the consumer in the  
23 form of higher prices or from the producer in the form of  
24 a lower price for his hard-earned produce.

1           Q     You were asked by at least two or three people,  
2 perhaps to wax philosophical, why have the shipping  
3 requirements of 10 percent or 5 percent when the  
4 marketwide Class 1 use is 40 percent. Let me ask you  
5 about that. You heard -- did you hear the testimony of  
6 Bill Fitchett and Jim Buelow who said a very high  
7 percentage of -- of milk is dedicated to Class 1, --

8           A     Yes.

9           Q     -- correct? That's because they choose to have  
10 a dedicated supply of milk to Class 1?

11          A     Yes.

12          Q     And that way, they have a small supply that  
13 basically uses the balance?

14          A     I would agree with that.

15          Q     Okay. When there's an existing dedicated  
16 supply to Class 1, usually by contract, it leaves a very  
17 small part of the Class 1 market for the balance of the  
18 milkshed to satisfy shipping requirements, correct?

19          A     Yes, it does create a severe imbalance.

20          Q     Okay. And it's really that portion that's not  
21 already dedicated that is the portion in which to fit the  
22 required shipments?

23          A     That is correct.

24          Q     And that small portion of Class 1 then has a

1 relationship to the reserve, the Class 3 and 4?

2 A Yes.

3 Q And we don't know precisely what that volume  
4 is, but it's substantially different than 4 to 6, correct?

5 A Absolutely.

6 MR. VETNE: That's all I have.

7 JUDGE BAKER: Thank you, Mr. Vetne.

8 Are there other questions for Mr. Schanback?

9 (No response)

10 JUDGE BAKER: Let the record reflect there are  
11 none. Thank you very much.

12 THE WITNESS: Thank you.

13 (Whereupon, the witness was excused.)

14 JUDGE BAKER: Mr. Vetne, are there further  
15 witnesses you wish to call?

16 MR. VETNE: Yes.

17 JUDGE BAKER: What proposal will this witness  
18 testify about?

19 MR. VETNE: This is Cyrus Cochran. He's a  
20 dairy farmer supplying milk to Friendship, and he's going  
21 to address in general performance requirements as well as  
22 marketwide service.

23 JUDGE BAKER: Very well. Thank you.

24 Whereupon,

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CYRUS COCHRAN

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VETNE:

Q Mr. Cochran, you've been sworn, and do you have prepared statements?

A Yes, I do.

Q Okay. Do you want to make any preliminary remarks concerning your background and experience in the dairy industry?

A Just that I'm a dairy farmer. I farm in joint venture with my father and currently two younger brothers. We've got about a 107 cows.

JUDGE BAKER: Excuse me. If you could please state your name for the court reporter? Thank you.

BY MR. VETNE:

Q State and spell your name for the record?

A Cyrus, C-Y-R-U-S, Cochran, C-O-C-H-R-A-N. And do you want the address?

Q No.

A But at any rate, with no further ado, my name is Cyrus Cochran. I'm a dairy producer from Westfield,

1 Pennsylvania. Our family ships milk to the Friendship  
2 Dairy Plant at Friendship, New York. We are thankful to  
3 have the opportunity to sell milk to one of the few  
4 remaining independent handlers in the Northeast that  
5 procures milk directly from dairy farmers.

6           Until 1998, for generations, my family has  
7 marketed its milk to cooperatives. In fact, my  
8 grandfather was one of the earliest members of the old  
9 Maryland Cooperative Milk Producers, long since absorbed  
10 into what is now DFA.

11           The nature of this hearing is a prime example  
12 of one of the reasons my family became independent  
13 producers. In this hearing process, I find it ironic to  
14 see our major dairy cooperatives electing to work together  
15 in an effort to financially frustrate independent  
16 producers. These same cooperatives collectively control  
17 market share not only in the Northeast but nationally as  
18 well, yet nothing has been accomplished by the group to  
19 significantly return a higher pay price to their members.  
20 In spite of this reality, co-ops continue to devote their  
21 efforts and energies to projects such as this, the  
22 ultimate end being the elimination of alternative markets  
23 for dairy farmers.

24           I am opposed to the so-called marketwide

1 service payments sought by the Proponent cooperatives.  
2 Marketwide services have a long and illustrious history in  
3 the Northeast. For decades, the old New York/New Jersey  
4 and New England Market Orders featured such payments to  
5 qualified cooperatives. I understand that USDA in  
6 Washington, D.C., has opposed the concept of marketwide  
7 services for decades. Why in the entire Milk Order Reform  
8 did USDA fail to include marketwide services in the merged  
9 Northeast Order?

10 Just as an infant cannot stay off its mother's  
11 nipple for very long, we now find the Northeast Dairy co-  
12 ops clamoring for Uncle Sam to restore these payments.  
13 The request for six cents per hundredweight on all member  
14 milk marketed by qualified dairy cooperatives would in my  
15 estimate pay about 4.5 cents per hundredweight in the  
16 Northeast Milk Order monthly producer revenue pool.  
17 That's about 4.5 cents per hundredweight off the top of  
18 family's monthly milk revenue and, quite frankly, we're  
19 running seriously into red ink with current milk prices  
20 and don't have either the money or the inclination to  
21 subsidize the inefficiencies of major Northeast dairy  
22 cooperatives from our money-losing Northeast dairy  
23 farmers.

24 At current milk price levels, about \$6 a

1 hundredweight lower than last year for August-September  
2 2002, I suspect virtually all the Northeast dairy farmers  
3 are in the same red ink cash flow situation as our family  
4 farm faces. In fact, recently in the Oneona Star, a New  
5 York daily newspaper, the president of Dairy Lakes Co-op,  
6 Clyde Rutherford, was quoted as saying you can't find a  
7 single Northeast dairy farmer making money at current milk  
8 prices. In such a situation, why must the co-ops try to  
9 drain the producer revenue pool, stealing money from all  
10 dairy farmers instead of finding further efficiencies in  
11 what promises to be a very tight Northeast dairy market?

12           Rather than honoring the co-op request for  
13 marketwide services, I urge USDA to investigate some of  
14 these major cooperatives' failure to perform on its  
15 services. Example. In Pennsylvania, Crowley's Food  
16 shipped it over to independent producers this past April 1  
17 to have their milk hauled, tested, inspected and paid for  
18 by Dairy Marketing Services, DMS, a joint venture of Dairy  
19 Farmers of America and Dairy Lee Co-op, Incorporated. I  
20 understand from talking with Friendship and Crowley's of  
21 Pennsylvania that their milk is tested twice a month for  
22 butterfat. However, Pennsylvania state law requires that  
23 the milk fat be tested four times per month.

24           Throughout the Northeast, grave questions are

1 arising about the accuracy of the DMS testing of milk for  
2 gram cell count and butterfat content. It would be  
3 against my self-interests to sanction payment of my scarce  
4 milk income to underwrite such incompetence and potential  
5 dishonesty. I'm afraid that the request for marketwide  
6 services, if approved by USDA, would continue a mindset in  
7 a statement made two decades ago by a Cornell University  
8 dairy economist. That economist, well into a cocktail  
9 party prior to the dairy dinner, stated that in the New  
10 York Milk Order, the co-op tried to "pull the screw" on  
11 them. I can think of no more appropriate summary of the  
12 marketwide services proposal than pulling the screw.

13 Further, as proposed, marketwide services would  
14 worsen the transit involuntary extraction of value from  
15 our family's struggling milk revenue. I already pay the  
16 Northeast Market Administrator's office about five cents  
17 per hundredweight for the MA's office to conduct testing  
18 of my milk. I suggest that this cost figure is high, that  
19 we are already paying five cents per hundredweight to MA  
20 for testing. Why should we get docked another net 4.5  
21 cents per hundredweight for the cost of marketwide  
22 services? If approved, the cost to the independent  
23 producer of combined MA testing and marketwide services  
24 would be 9.5 cents per hundredweight.

1           The Cochran family has a problem when money is  
2 involuntarily extracted from our monthly milk revenues.  
3 My parents, John and Betty Cochran, are plaintiffs in a  
4 legal action against USDA seeking to overturn the  
5 mandatory 15 cents per hundredweight National Dairy  
6 Promotion assessment on the grounds that the assessment  
7 violates our free speech sections of the U.S.  
8 Constitution.

9           Finally, I would like to also comment on the  
10 proposal to mandate year-around Market Class 1 shipping  
11 requirements in the Northeast Milk Order. I think this  
12 proposal is wrong. It places further burden on Class 1  
13 performance for milk plants that are located a long  
14 distance from the Class 1 markets and processors. To  
15 require year-around monthly Class 1 shipping requirements  
16 would result in the uneconomical movement of producer  
17 milk.

18           Further, given the fact that Dairy Farmers of  
19 America controls so much access to Class 1 handlers in the  
20 Northeast, I suggest that mandating monthly Class 1  
21 shipping requirements would force both independent  
22 producers and independent non-Class 1 handlers to further  
23 kowtow to DFA. It is wrong to use the Federal Milk Orders  
24 to boost the fortunes of cooperatives at the expense of

1 other more efficient parties in the industry.

2 In conclusion, I would restate, no marketwide  
3 services and no expansion of Class 1 performance  
4 requirements, and thank you very much for the time to  
5 express that.

6 JUDGE BAKER: Very well. Are there any  
7 questions for Mr. Cochran? Yes, Mr. English?

8 CROSS EXAMINATION

9 BY MR. ENGLISH:

10 Q Mr. Cochran, for your family farm operation,  
11 you may not be aware that there's a provision within these  
12 rules that defines a small business and for dairy farmer  
13 purposes, that is the total income of \$780,000 or less.

14 Would your business qualify as a small  
15 business?

16 A Yes.

17 Q Yes?

18 A Yes, it would.

19 MR. ENGLISH: Thank you.

20 JUDGE BAKER: Are there other questions for Mr.  
21 Cochran? Mr. Beshore?

22 CROSS EXAMINATION

23 BY MR. BESHORE:

24 Q Good morning, Cy.

1           A     Hi, Marv.

2           Q     Let's just talk about something that we'll  
3     agree on.

4           A     We'll try.

5           Q     You think the Secretary of Agriculture should  
6     change these Market Order regulations to -- to push back,  
7     to allow handlers to pay producers later or to pay now?

8           A     I've been thinking about that. I think, first  
9     off, strictly that as far as that date, no. But think  
10    the bigger problem with that is not so much the date we  
11    receive the checks but particularly that advance check is  
12    -- it seems like somehow it should be more indicative of  
13    what the final check's going to be.

14          Q     We tried that in a couple other hearings and  
15    haven't gotten anywhere. So, we've kind of thrown in the  
16    towel. But --

17          A     That's a case, kind of my beef with the dairy  
18    cooperatives, that they would take the incentive there and  
19    -- and the initiative and start setting a higher -- paying  
20    a higher advance and for a change having them set a  
21    market.

22          Q     Are you aware that's -- that that is done, you  
23    know, in some cases here in the Northeast? The rate of  
24    the advance by the cooperatives was higher than in the

1 mandate?

2 A In -- in some cases, it hasn't been higher.

3 Q In any event, as -- as a dairy farmer, as you  
4 understand it, for every day you don't have that check,  
5 partial or final, it's costing you money, right?

6 A Right.

7 MR. BESHORE: Okay. Thanks.

8 JUDGE BAKER: Are there other questions for Mr.  
9 Cochran?

10 (No response)

11 JUDGE BAKER: Let the record reflect there are  
12 none.

13 Thank you very much, Mr. Cochran.

14 (Whereupon, the witness was excused.)

15 JUDGE BAKER: You have not moved into evidence  
16 what has been marked as Exhibit 33, Mr. English.

17 MR. ENGLISH: You're not the first one to  
18 remind me of that.

19 JUDGE BAKER: All right.

20 MR. ENGLISH: Thank you. I -- I so move.

21 JUDGE BAKER: Are there any questions or  
22 objections to Exhibit 33?

23 (No response)

24 JUDGE BAKER: Let the record reflect there are

1 none.

2 Exhibit 33 is admitted and moved into evidence.

3 (The document referred to,  
4 having been previously marked  
5 for identification as  
6 Exhibit Number 33, was  
7 received in evidence.)

8 MR. ENGLISH: Thank you.

9 JUDGE BAKER: You're welcome.

10 MR. ENGLISH: That's all I have, Your Honor.

11 JUDGE BAKER: You have no further witnesses?

12 MR. ENGLISH: No further witnesses.

13 JUDGE BAKER: Very well. We can now progress  
14 to any other proposals.

15 Mr. Beshore?

16 MR. BESHORE: I think Mr. Rasmussen may have  
17 some testimony.

18 JUDGE BAKER: So far, we have heard testimony  
19 on Proposals 1, 2, 3, 8, 9, 10, and 11 has been withdrawn.

20 MR. BESHORE: I believe that there are -- Mr.  
21 Arms is going to go twice, once on everything other than  
22 Proposal 14, and then Proposal 14 which is separate, he  
23 will go on that, and Mr. Conover has some testimony, and  
24 I, in talking to Mr. Beshore, I believe he has two

1 witnesses, and I'm just thinking that it being 10 after  
2 12, it might make sense to take Mr. Rasmussen, if he's  
3 ready. He has some proposals of his own, and I think he's  
4 going to present some testimony, and I also made a request  
5 for information from him.

6 JUDGE BAKER: Very well.

7 Whereupon,

8 ERIK RASMUSSEN

9 having been first duly sworn, was called as a witness  
10 herein and was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BESHORE:

13 Q Could you state your name and address for the  
14 record, please?

15 A Yes. My name is Erik with a K Rasmussen,  
16 R-A-S-M-U-S-S-E-N. I'm the Market Administrator of the  
17 Northeast Marketing Order, USDA. The business address is  
18 30 Winter Street, Boston, Massachusetts.

19 Q Could you describe briefly for the record what  
20 your duties are as the Market Administrator?

21 A To administer the terms and provisions of the  
22 Northeast Marketing Order.

23 Q And how long have you been in that position?

24 A Since January 1, 2000.

1 Q And can you briefly state for the record your  
2 previous employment in the Market Administrator's offices  
3 or in the dairy industry?

4 A Prior to that, I was the Market Administrator  
5 of the New England Marketing Order which began in 1990.  
6 Prior to that, I was Executive Director of the New York  
7 State Legislative Commission on Dairy Industry  
8 Development. Prior to that, I was Assistant Market  
9 Administrator in the New York/New Jersey Marketing Order.  
10 Prior to that, I was an economist for the New York/New  
11 Jersey Market Administrator.

12 Q All right. Do you have some testimony  
13 prepared, statements that you would like to give for the  
14 record today?

15 A Yes.

16 Q Can you tell us what these statements relate  
17 to; that is to say, what proposals you'd be making your  
18 statements concerning?

19 A I have Proposal Number 4 and Proposal Number  
20 12.

21 Q All right. Would you -- would you go ahead and  
22 give your statement on those proposals, please?

23 A Yes. On Proposal Number 4 first, I have  
24 proposed a change in Section 72 from no later than the

1 16th day of the month to a change of no later than the day  
2 after the payment required in Section 71. The effect of  
3 this, Section 71 is the payment into the Producer  
4 Settlement Fund. Section 72 is the payment out of that  
5 fund.

6 The issue arises and I'll refer to Exhibit 5,  
7 Page 42 through 44, the payment dates under the Order,  
8 referring specifically to the payment that's listed there,  
9 P/S Fund, that's Producer Settlement Fund, and payment  
10 from that fund. In the year 2000, which is Page 42 of  
11 Exhibit 5, in the pool -- for the pool month March, June,  
12 September and December, the payment into and out of the  
13 fund was on the same days. In the year 2001, for March,  
14 June, August, and November, the payments into and out of  
15 the fund were on the same days, and for the months in  
16 2002, May, August, which is occurring right now, Monday,  
17 and November, will have to be made payments into and out  
18 of the fund the same day.

19 The problem arises when there are checks for  
20 late payments and there's inadequate funds to make the  
21 payment in and out, clear funds, on the same day. The  
22 Order provides that I can reduce the pro rata the payments  
23 to handlers who can in turn reduce pro rata the payment to  
24 dairy farmers. On one occasion, we ran into this

1 situation. I made the determination to go into the  
2 assessment fund reserve, break the CDs and make the  
3 payment, and it was not a problem that it was the handlers  
4 that were losing, it was just where they couldn't find the  
5 transfer. So, the effect of the proposal would be to  
6 allow one extra day which would mean three or four times a  
7 year, the dairy farmers would receive their money one day  
8 later, but they would at least be assured of receiving the  
9 full amount.

10 That's all I have on Proposal 4.

11 Q Okay. Why don't you give your statement on  
12 Proposal Number 12, if you'd like?

13 A Proposal 12 is a continuation of a technical  
14 correction. It is changing the words "pool plant  
15 operator" in Section 73-B to "handler". The Department in  
16 the Federal Register, Volume 65, Number 99, May 22nd,  
17 2000, published a final rule correction for milk in New  
18 England and other Orders, making it identical across the  
19 Order system, the word "handler" in 73-A and 73-B. It was  
20 a mixture of both across the Order system after Reform.  
21 It was considered a technical correction.

22 This section continues with "pool plant  
23 operator". The effect of changing it to "handler" would  
24 be if a cooperative did not operate a pool plant but paid,

1 add "among member farmers, they would have to provide them  
2 the same information as our member farmers are required to  
3 receive from all other handlers who operate pool plants."

4 I consider it an extension of that technical  
5 correction. That concludes my testimony on 12.

6 JUDGE BAKER: Very well. Are there any --

7 MR. BESHORE: We offer this.

8 JUDGE BAKER: Are there any questions? Yes,  
9 Mr. English?

10 CROSS EXAMINATION

11 BY MR. ENGLISH:

12 Q Mr. Rasmussen, thank you very much for that  
13 testimony and the information. I think it's obvious  
14 there's no uniform agreement.

15 There is one series of questions I would ask as  
16 to information that you may have with respect to the  
17 timing in which handler reports have actually been  
18 received, and while you are not here to testify in favor  
19 or against Proposal 1, nonetheless I'm going to ask if you  
20 can answer some questions about the actual physical  
21 receipt of handler reports by your office.

22 A Yes. With your request, I inquired since we  
23 were doing the pool at this time and would have the  
24 information. I have that information.

1           Q     Can you provide information with respect to  
2 reports received by the -- obviously it's not many, as I  
3 understand it, but rather numbers of reports received  
4 prior to the 9th, on the 9th, prior to 5:00, which I think  
5 is close of business for your office, --

6           A     Yes.

7           Q     -- after 5:00 on the 9th, and reports received  
8 on the 10th?

9           A     Yes, I can. The total number of pool reports  
10 for this month, that's the month of August, which was done  
11 between the 9th and 12th of this week, there were 86 total  
12 reports, 11 of them were received before the 9th, actually  
13 on Friday, 61 were received on the 9th, 46 were before the  
14 close of business, 15 after the close of business. There  
15 were 14 received on the 10th. I hope that's right. I  
16 can't read my own writing.

17          Q     It adds up to 86 for me.

18          A     Right.

19               MR. ENGLISH: Thank you. That's all I have,  
20 and I appreciate your getting that for me.

21               JUDGE BAKER: Thank you.

22               Are there other questions?

23               (No response)

24               JUDGE BAKER: Let the record reflect -- oh,

1 yes? Do you have questions? Very well. Are there any  
2 other questions? Yes, Mr. Beshore?

3 REDIRECT EXAMINATION

4 BY MR. BESHORE:

5 Q Just one question on Proposal 4. The -- is  
6 there any other way that you can see as the Market  
7 Administrator, besides pushing the day back one time three  
8 or four times a year, to make sure that you got the money  
9 for producers to be paid in full?

10 A There could be several ways. One would be to  
11 increase the size of the Producer Settlement Fund Reserve  
12 which is a nickel they have to pay back, pay another  
13 nickel. It runs around 8 or 9 cents a hundredweight, but  
14 that would essentially lower producer prices.

15 Q Okay.

16 A The other could be to require wires, wire  
17 payments by a certain time during that day, but we've had  
18 numerous occasions when the handler says a wire and the  
19 banking system loses it. Most of them have been small and  
20 haven't affected it. One was a substantial amount and it  
21 did. So I don't see any other way that wouldn't have --  
22 that would do it, and this in fact potentially would. If  
23 somebody did not pay even on the 16th, we would incur a  
24 late charge but that doesn't help you.



1 called you, and you've been previously sworn.

2 Whereupon,

3 DAVID ARMS, SR.

4 having been previously duly sworn, was recalled as a  
5 witness herein and was examined and testified further as  
6 follows:

7 JUDGE BAKER: Yes. I think he's busy passing  
8 things out. We are now in order after our luncheon  
9 recess.

10 MR. ENGLISH: Your Honor, I've handed out to  
11 the parties, the court reporter and yourself, four  
12 statements by Mr. Arms, Number 1, 2, 3 and 4, and I'd ask  
13 that they be given the next four consecutive numbers which  
14 I believe --

15 JUDGE BAKER: Be 34, --

16 MR. ENGLISH: -- would be 34, 35, 36 and 37.

17 JUDGE BAKER: Correct. Very well.

18 MR. ENGLISH: In the order of 1, 2, 3 and 4.

19

20

21 (The documents referred to  
22 were marked for identification  
23 as Exhibit Numbers 34, 35, 36  
24 and 37.)

1 JUDGE BAKER: Do you wish to proceed?

2 MR. ENGLISH: I would ask that Mr. Arms give  
3 all four statements in seriatim and then be subject to  
4 cross examination on all four --

5 JUDGE BAKER: Very well.

6 MR. ENGLISH: -- rather than bringing him up  
7 several times.

8 JUDGE BAKER: Very well.

9 MR. ENGLISH: And I would ask that, as to 36,  
10 Exhibit 36, in order to save time, 36 includes, in the  
11 beginning, the language of the proposal in its entirety,  
12 and the witness proposes to skip that, but we ask that it  
13 be read into the record as if read.

14 JUDGE BAKER: Very well. Mr. Reporter, will  
15 you make a note of that, please? Thank you.

16 "Proposal Number 3. New York State Dairy  
17 Foods, Inc., proposes to amend the producer milk  
18 definition in Section 1001.13 by adding new Paragraphs  
19 (d)(6) to read as follows:

20 Section 1001.13 Product Milk. (d)(3) The  
21 equivalent of at least two day's milk production of a  
22 dairy farmer is caused by the handler to be physically  
23 received at a pool plant in each of the months of August  
24 through December.

1           (4) Of the total quantity of producer receipts  
2 during the month, including diversions, the handler  
3 diverts to non-pool plants not more than 60 percent of  
4 such receipts in each of the months August through January  
5 and December and not more than 75 percent in each of the  
6 months January through July.

7           (5) Any milk diverted in excess of the limits  
8 set forth in Paragraph (d)(4) of this section shall not be  
9 producer milk. The diverting handler shall designate the  
10 dairy farmer deliveries that shall not be producer milk.  
11 If the handler fails to designate the dairy farmer  
12 deliveries which are ineligible, producer milk status  
13 shall be forfeited with respect to all milk diverted to  
14 non-pool plants by such handler; and

15           (6) The delivery requirements and the  
16 diversion percentages in Paragraphs (d)(3) and (d)(4) of  
17 this section may be increased or decreased by the Market  
18 Administrator if the Administrator finds that such  
19 revision is necessary to assure orderly marketing and  
20 efficient handling of milk in the Marketing Area. Before  
21 making such a finding, the Market Administrator shall  
22 investigate the need for the revision either on the Market  
23 Administrator's own initiative or at the request of  
24 interested persons if the request is made in writing at

1 least 15 days prior to the month for which the requested  
2 revision is to be made effective. If the investigation  
3 shows that a revision might be appropriate, the Market  
4 Administrator shall issue a notice stating that the  
5 revision is being considered and inviting written data,  
6 views, and arguments. Any decision to revise an  
7 applicable percentage must be issued in writing at least  
8 one day before the effective date.

9 Justification Proposal 3. This amendment is  
10 being proposed because we are finding the current Reform  
11 Order pooling provisions far too liberal. Since its  
12 inception in January 2000, the new provisions have  
13 resulted in abusive pool riding practices and the  
14 association of milk from distant sources not readily  
15 available to handlers to satisfy market fluid milk needs  
16 during the pool-qualifying months August through December.

17 Because the Northeast Order has unlimited  
18 diversion rules and frequently enjoys a higher classified  
19 use value than certain other markets, some handlers have  
20 been able to draw the higher Northeast Order pool producer  
21 differential returns for their milk, without establishing  
22 a meaningful and continuing association with Order 1 pool  
23 plants. Under the new pooling standards, a handler can  
24 pool milk indefinitely in Order 1 simply on the basis of a

1 single delivery to a pool plant. The handler then diverts  
2 unlimited quantities locally at a special net pricing  
3 advantage than is otherwise available on the milk. The  
4 end result is in an unwarranted transfer of Order 1 PPD  
5 funds because the diverting handler has no intention of  
6 becoming a regular source of reserve milk for the  
7 Northeast Order. Rather, the milk is moved to a pool  
8 plant in Order 1 only as necessary to qualify for the  
9 higher PPD payment. Under these circumstances, producers  
10 and handlers in Order 1 find themselves once again  
11 carrying some of the reserve associated with another  
12 market.

13 We propose to restrict such abuse of the  
14 pooling privilege by requiring that at least two days'  
15 milk production from each dairy farmer in the pool must  
16 touch base at a pool plant in each of the pool-qualifying  
17 months rather than only once. Secondly, we propose to  
18 limit the diversions of pool milk to non-pool plants  
19 throughout the year to no more than 60 percent August  
20 through December and to no more than 75 percent in other  
21 months. We also propose in 1001.13(d)(5) standard  
22 depooling language found in other Orders for over-diverted  
23 milk along with provision in (d)(6) allowing the Market  
24 Administrator the means to adjust the diversion limits as

1 orderly marketing conditions may require.

2 Data on Page 87 of Exhibit Number 5 shows very  
3 clearly the dramatic extent of pool riding taking place in  
4 the Northeast in recent years under Order Reform. From  
5 the data, we note dramatic increase in producer milk  
6 receipts from distant sources, especially in the flush  
7 season, exceeding 100 million pounds from more than 800  
8 producers in some months. The milk involved came from  
9 such distant states as Idaho, Minnesota, Wisconsin,  
10 Michigan, and Utah. None of this milk was needed to  
11 balance fluid milk needs here. Much of it was diverted  
12 elsewhere, rather than being physically received on a  
13 regular basis at pool plants in the Northeast.

14 Similarly, the data on Pages 2 and 3, Exhibit  
15 5, showing the number of producers and daily average  
16 output of producer milk originating from states outside  
17 the Northeast, gives a clear picture of the seasonal  
18 swings in these receipts, obviously pooled to the  
19 disadvantage of northeastern producers.

20 Adoption of our proposed amendments in Proposal  
21 Number 3 would alleviate the pool riding problem by  
22 placing reasonable seasonal limits on diversions of pool  
23 producer milk to non-pool plants. Precedent for such  
24 diversion limits had previously been established in the

1 Northeast in the former Orders prior to merger in 2000.  
2 Our proposal is also similar to that recently made  
3 effective in the Mideast Federal Order and is designed to  
4 correct similar problems. Provision for more restrictive  
5 diversion limits in the pool-qualifying months August  
6 through December, 60 percent vs. 75 percent in other  
7 months, better assures availability of fluid milk supplies  
8 at pool distributing plants when needed. Diversions in  
9 excess of 75 percent in the non-qualifying months should  
10 be depooled because it involves the pooling of excess  
11 reserves at pool producers' expense. The 75 percent limit  
12 allows enough flexibility to handlers to schedule  
13 diversions of producer milk for manufacturing as may be  
14 necessary without losing pool status.

15 New York State Dairy Farmers, Inc., strongly  
16 urges the adoption of Proposal Number 3 to eliminate the  
17 clearcut abuse of the present pooling provisions in the  
18 Order.

19 This concludes our statement on Proposal 3."

20 MR. ENGLISH: Mr. Arms has been previously  
21 sworn, and I propose that he can now give his first  
22 statement.

23 DIRECT TESTIMONY

24 THE WITNESS: Proposal Number 1. The four

1 amendments incorporated in Proposal Number 1 would  
2 essentially restore the reporting and payment dates  
3 previously specified in the former New York/New Jersey  
4 Order. Proponent and supporting handlers, hereinafter  
5 listed, consider these proposals necessary to correct  
6 disorderly marketing conditions that have resulted from  
7 the advanced reporting and payment dates promulgated under  
8 the Reform Order made effective January 2000.

9 The first of the proposed 4(d) changes to the  
10 Order involves the date for filing monthly reports with  
11 the Market Administrator. As noticed for this hearing,  
12 the specific amendment language is as follows, and if the  
13 recorder could put that in, please.

14 "Each handler shall report monthly so that the  
15 Market Administrator's office receives the report on or  
16 before the 10th day after the end of the month in the  
17 detail and on prescribed forms as follows."

18 Justification Re: Item 1. The due date for MA  
19 reports, equalization payments, and payment for milk to  
20 vendors under new Reform Order requirements have become  
21 very difficult for Proponent buyer handlers to meet. The  
22 advent of the Reform Order brought with it a departure  
23 from farm-town-zone pricing, unique under the former New  
24 York/New Jersey Order, as well as detailed reporting

1 requirements mandated for the switch from basic skim and  
2 butterfat accounting to complete component accounting for  
3 protein and other solids as well as for the butterfat in  
4 the milk.

5 Adapting to the new reporting provisions, moved  
6 ahead a day, from the 10th the 9th, of the following month  
7 was difficult enough, without the added strain caused by  
8 the fact the basic system was being radically changed from  
9 farm to plant zone pricing, together with component milk  
10 pricing and certain other Order changes, all at the same  
11 time. As a result, MA reports suffered from inadequate  
12 and inappropriate data collection which has not been  
13 completely sorted out in audit even to this day.

14 The Reform Order failed to justify moving the  
15 reporting date ahead to the 9th. Suppliers have  
16 consistently experienced considerable difficulty  
17 furnishing needed milk component data and billings to  
18 buyer handlers in time for the latter to meet the new  
19 reporting and payment deadlines. Often MA reports were  
20 and still are filed containing erroneous or estimated data  
21 simply because the reporting handler could not ascertain  
22 the correct data in time. We know that this continuing  
23 problem would be greatly alleviated if the reporting date  
24 were to be moved back to the 10th, giving both suppliers

1 and buyers an additional day to complete their work.

2           It is our position that milk handlers should  
3 not be penalized for failure to meet reporting deadlines  
4 if they can't verify the data in the time allowed. Also,  
5 the fact that Order Number 1 is the largest milk Order,  
6 dealing with so many special marketing complexities, needs  
7 to be given greater consideration in setting the mandated  
8 reporting and payment dates. For example, some  
9 Northeastern milk handlers process or account for more  
10 milk than was received and processed in some milk Orders  
11 in the U.S. prior to Order Reform. Furthermore, there is  
12 extensive co-mingling of bulk milk on tankers traveling  
13 over great distances, a condition extensively cultivated  
14 among handlers in the former New York/New York Order, due  
15 to the prior system of farm-point pricing and related need  
16 to maximize hauling efficiencies from farm to plant.  
17 Consequently, the fact that there is more co-mingling of  
18 milk on the same tankers automatically entails more time  
19 in verifying receipts from each source represented in the  
20 co-mingled load, and because the Order Number 1 milkshed  
21 is so large, milk hauling costs become very important to  
22 both handlers and producers. Therefore, we think the  
23 Order should encourage rather than discourage the least-  
24 cost hauling solutions that have evolved over the years as

1 represented in existing co-mingled bulk routes. By  
2 allowing the additional day in verifying respective  
3 handler component volumes, the accuracy of MA reports will  
4 be enhanced and audits made easier and less costly for all  
5 concerned, including the Market Administrator.

6 All handlers, including cooperatives, should be  
7 required to meet information report deadlines. We find  
8 that inordinate rushing causes too many MA report  
9 adjustments and tends to increase the administrative  
10 workload for everyone involved.

11 2. The second change in reporting requirement  
12 proposed by the New York State Dairy Foods Group involves  
13 the date specified in the Order for the Market  
14 Administrator to announce the producer price differential,  
15 PPD, and the statistical uniform price each month.

16 Specifically, we propose the following changes,  
17 and if the reporter would copy that.

18 "Section 1001.62 Announcement of Producer  
19 Prices. In the introductory text, revise the reference to  
20 the 13th day to 14th day and add new Paragraph (h) to  
21 read: (h) If the 14th falls on a Saturday, Sunday, or  
22 national holiday, the Market Administrator may have up to  
23 two additional days to announce the producer price  
24 differential and the statistical uniform price."

1                   Justification Re: Item 2. Our proposed change  
2 to the introductory text in Section 1001.62 simply gives  
3 the Market Administrator up to the 14th of the month to  
4 announce the final producer pay price, as was provided  
5 previously in the former New York/New Jersey Order. This  
6 suggested amendment is consistent with our proposed one-  
7 day extension for submission of handler MA reports.  
8 Furthermore, it would allow the MA additional time, if  
9 needed, up to two additional days, if the stated official  
10 deadline of the 14th of the following month falls on a  
11 weekend or a national holiday.

12                   This proposal is consistent with our first date  
13 change proposed discussed above to restore the mandated MA  
14 report deadline to the 10th rather than the 9th. It also  
15 would give the MA more latitude in establishing monthly  
16 uniform price announcement dates should the official  
17 deadline otherwise fall on a weekend or a national  
18 holiday. This latter provision would extend to the MA  
19 sufficient time to make the necessary price computations  
20 without undue pressure brought about by weekend or holiday  
21 circumstances.

22                   Although this proposal could give the MA up to  
23 two additional days for making the price computations, it  
24 does not require the additional time be used if the MA

1 finds it possible and advisable to announce the producer  
2 pay prices earlier. In fact, the MA might still announce  
3 the final PPD on the 13th or earlier, if feasible to do  
4 so. The MA would have such flexibility under our proposal  
5 because the language currently refers to "on or before"  
6 the final date and we do not propose removing this text  
7 relative to proposed new date of the 14th. However, we do  
8 recognize that the day-later handler report deadline that  
9 we are proposing would also be expected to require similar  
10 additional day for the MA staff to complete their work as  
11 well.

12 With respect to proposed new Paragraph (h) in  
13 Section 1001.62, we are suggesting this amendment only  
14 because the current provision does not appear to give the  
15 MA flexibility in announcing the official producer pay  
16 price, if the stated report date of the 14th, currently  
17 the 13th, happens to fall on a weekend or a national  
18 holiday.

19 Under current conditions, the MA staff must  
20 work overtime or on the weekend in order to get the  
21 necessary work done and the producer pay price announced  
22 on time, if the announcement date provided in the Order  
23 happens to fall on the weekend or national holiday. We  
24 know that on several occasions, the MA has announced the

1 producer pay price on the 12th of the month under  
2 difficult time constraints. We believe the MA should not  
3 have to meet an unreasonable report deadline and therefore  
4 should be extended the same courtesy as is now provided  
5 handlers in making payments pursuant to Section .90. This  
6 provision states, "If a date required for a payment  
7 contained in the Federal Milk Order falls on a Saturday,  
8 Sunday, or a national holiday, such payment will be due on  
9 the next day that the Market Administrator's office is  
10 open for public business." Our proposal would give the MA  
11 the flexibility to adjust the producer price announcement  
12 date up to two additional days, if necessary, under such  
13 circumstances. We stress, however, that there is no  
14 requirement under our proposal that the MA use the extra  
15 time afforded.

16 3. The third proposed date change involves the  
17 required date of settlement by handlers with the Market  
18 Administrator for payment to the Producer Settlement Fund.  
19 The proposal, as written in the hearing notice, is as  
20 follows, and I'd ask the clerk to type that.

21 JUDGE BAKER: Very well. Mr. Reporter, will  
22 you make a note in that regard?

23 "Section 1001.71 Payments to the Producer  
24 Settlement Fund. Each handler shall make payment to the

1 Producer Settlement Fund in a manner that provides receipt  
2 of the funds by the Market Administrator no later than two  
3 days after the announcement of the producer price  
4 differential and the statistical uniform price pursuant to  
5 Section 1001.62, except as provided for in Section  
6 1000.90. Payment shall be the amount, if any, by which  
7 the amount specified in Paragraph (a) of this section  
8 exceeds the amount specified in Paragraph (b) of this  
9 section."

10 THE WITNESS: Justification RE: Item 3. This  
11 proposal is intended primarily as a conforming change made  
12 necessary by the one-day proposed extension in the date  
13 for filing MA reports and the computation of the producer  
14 price differential, PPD, and the statistical uniform  
15 price. It would make the handler payment deadline fit  
16 better with the date the uniform price is announced.

17 Currently, the Reform Order specifies that  
18 handler payments to the Producer Settlement Fund be made  
19 no later than the 15th after the end of the month, unless  
20 modified pursuant to Section .90, which provides  
21 additional time if the 15th falls on a weekend or national  
22 holiday. In the latter circumstance, the payment to the  
23 Producer Security Fund can be delayed to the next business  
24 day.

1           Since the current Order also specifies the 13th  
2           as deadline for computing the producer price differential,  
3           a two-day interval from the 15th, we have similarly  
4           proposed a conforming two-day interval from the date that  
5           the PPD would be announced under our proposal. We also  
6           propose to maintain the existing special exemption  
7           pursuant to Section .00, allowing additional time if the  
8           PPD is announced on a weekend or a national holiday.

9           Proponents consider the current handler payment  
10          requirement to the Producer Security Fund, deadline of the  
11          15th, difficult to comply with given the current deadline  
12          mandated for computing the PPD and uniform price. Rather  
13          than proposing new handler payment deadline date extended  
14          by one day, which would be the 16th, we have instead  
15          simply proposed the new deadline be no later than two days  
16          following date of the PPD price announcement. The change  
17          would better suit capital flow from handlers to the  
18          Producer Settlement Fund from month to month, knowing the  
19          interval in business days from the time the PPD is  
20          announced to payment to the Producer Settlement Fund would  
21          always be no more than two business days. Our proposal  
22          gives handlers a consistent time frame in which to execute  
23          the capital transfers involved. It also enables improved  
24          concurrent billings for milk transfers or diversions

1 because a more consistent time interval is provided in  
2 which to ascertain what the MA assignment to classes was  
3 on such transfers at pool time.

4 4. The fourth and final date change set forth  
5 in Proposal Number 1 of the hearing notice would amend the  
6 payment dates the producers in Subparagraphs (a)(1) and  
7 (a)(2) of Section .73. The proposal was as follows, and  
8 again if that could be inserted.

9 JUDGE BAKER: Very well. Mr. Reporter, would  
10 you please add that to the record?

11 "Section 1001.73 Payments to Producers and  
12 Cooperative Associations.

13 Introductory text unchanged. (a) Preliminary  
14 text in (a) unchanged.

15 (1) Partial payment. For each producer who  
16 has not discontinued shipments as of the 23rd day of the  
17 month, payment shall be made so that it is received by the  
18 producer on or before the 30th day of the month, except as  
19 provided in Section 1000.90, for milk received during the  
20 first 15 days of the month at not less than the lowest  
21 announced class price for the preceding month, less proper  
22 deductions authorized in writing by the producer.

23 (2) Final payment. For milk received during  
24 the month, payment shall be made so it is received by each

1 producer no later than the day after the required day of  
2 payment by the Market Administrator the following month,  
3 pursuant to Section 1001.72, in an amount computed as  
4 follows: (subsequent text unchanged.)"

5 THE WITNESS: Justification RE: Item 4. The  
6 primary purpose of this proposal is to make date of final  
7 payment to producers conform with the changes previously  
8 proposed in the payment dates for computing the uniform  
9 price and in settlement dates to and from the Producer  
10 Settlement Fund account. We are, therefore, at this point  
11 in our statement addressing the need to amend Section  
12 .73(a) to best accommodate our prior date change amendment  
13 proposals.

14 We feel it important at this time to also call  
15 attention to the fact that we did not propose any change  
16 in the requirement for day-earlier payments to  
17 cooperatives as currently set forth in Section .73(b).  
18 Our proposal would continue to relate the date for final  
19 payment to the day after payments are made by the Market  
20 Administrator from the Producer Settlement Fund.  
21 Therefore, under our proposal, dates of final payment  
22 could move a day or two later only if the date of payment  
23 from the Producer Settlement Fund were extended the same  
24 number of days. This sequence in the relationship of date

1 of final payment to date of payment from the Producer  
2 Settlement Fund should be continued.

3           Upon careful reflection on the issues involved  
4 with the several date changes proposed, we find it is  
5 necessary to move the date of partial or advance payments  
6 as well. Otherwise, the number of days between dates of  
7 partial and final payments will narrow still more. We  
8 find that during 2001, the current spread in days between  
9 final payment date for milk received the prior month and  
10 the date of advance payment, partial payment for milk  
11 received in the current month averaged only nine days,  
12 with the variation from six to 12 days. The six-day  
13 spread was in February and the 12-day spread occurred in  
14 May. That spread in days would be reduced possibly two to  
15 four days pursuant to our proposed date change extensions.  
16 Consequently, we have proposed in Paragraph (a)(1) that  
17 the date of partial payment be moved to the 30th of the  
18 month instead of the 26th as now provided.

19           For the convenience of interested parties, we  
20 have attached Table 1 -- excuse me.

21           Can you help me, Chuck?

22           MR. ENGLISH: It's Exhibit 26.

23           THE WITNESS: Okay. Table 1, Exhibit 26, --

24           JUDGE BAKER: Mr. English, are you saying that

1 Table 1 on Exhibit 26 is the one you're making your  
2 recommendation on?

3 MR. ENGLISH: Yes.

4 JUDGE BAKER: Very well. Thank you.

5 THE WITNESS: Table 1 shows the year 2002 dates  
6 of partial payment -- partial advance and final milk  
7 payments to cooperatives, together with the dates of  
8 payment into and out of the Producer Settlement Fund  
9 account. From the data, we find that a much longer spread  
10 in days currently exists between dates of advance and  
11 final payments for milk received the same month. In 2002,  
12 that spread will average 22 days by year-end, as show in  
13 the table.

14 Making advance payments on or before the 30th  
15 of the month would conform more closely with the dates  
16 previously set in the respective Orders prior to merger  
17 and, more importantly, would create better spacing between  
18 required pay dates, more to the liking of many independent  
19 producers as well as handlers, and while the date of  
20 advance payment was moved ahead under Order Reform, it is  
21 important to note that some cooperatives have not changed  
22 member pay dates in like manner. Other handler witnesses  
23 will testify at this hearing regarding the difficulties  
24 they have experienced under the current partial payment

1 provisions contained in Subparagraph (a)(1).

2 We also call attention to the fact that while  
3 we propose the 30th as the new deadline for the making of  
4 partial payments, actual advance pay dates may differ as  
5 the proposed Order language still refers to on or before  
6 the 30th of the month.

7 There is another NYSDFI proposed date change  
8 not included under Proposal number 1 by the USDA. Rather,  
9 it was joined with others, ADCNE and the cooperatives and  
10 the Market Administrator, in Proposal 4, which would amend  
11 Section .72 regarding dates of payment from the Producer  
12 Settlement Fund by the Market Administrator. Accordingly,  
13 we will address this issue in separate testimony on the  
14 merits of Proposal 4.

15 Finally, we call special attention to a  
16 marketing problem experienced by certain NYSDFI membership  
17 which would be alleviated considerably were the amended  
18 payment dates incorporated in Proposal Number 1 adopted by  
19 the Secretary. The problem relates to tolled bulk milk  
20 purchased by licensed milk distributors for processing and  
21 packaging into Class 1 product at pool distributing  
22 plants. New cooperative 9-C provisions in Order 1 require  
23 that the tolled milk be purchased at the PPD and component  
24 prices rather than at straight Class 1 skim and butterfat

1 prices, as before. Consequently, an adjustment is  
2 required each month for the MA credit issued to the  
3 processing handler on the 9-C receipts together with a  
4 charge for the MA assessment fee on the tolled milk.

5 The processor must then prepare billing to the  
6 distributor at the difference between Class 1 cost of the  
7 skim and butterfat and the 9-C credit from the Market  
8 Administrator, plus the MA fee involved. To do so  
9 requires detailed component values as well as the final  
10 PPD price. The billing involved is made subsequent to the  
11 PPD price announcement and issue by the MA of the  
12 handler's pool obligation, which is needed to make the  
13 billing for the 9-C adjustment involved. This requires  
14 some additional time after the MA announces the uniform  
15 price. Adoption of Proposal Number 1 by the Secretary  
16 will help proponent handlers who experience this special  
17 problem.

18 This concludes our statement on Proposal Number  
19 1, except for direct supporting testimony which I think  
20 has been presented already here.

21 JUDGE BAKER: Very well. Thank you very much.

22 May the witness be examined now with respect to  
23 Proposal 1?

24 MR. ENGLISH: Well, Your Honor, I would think

1 it would be more efficient if he would move on and let him  
2 read Proposals 2, 3 and 4 and just be cross examined in  
3 total. I just think it's more efficient. It's up to you,  
4 but it strikes me as -- as being more efficient.

5 JUDGE BAKER: Well, I don't know whether it'd  
6 be more efficient or not. Some people may forget their  
7 questions. All right. We will move on to Proposal Number  
8 2.

9 THE WITNESS: Proposal Number 2. We propose  
10 two amendments to the pool plant definition in Section .7.  
11 These are as follows.

12 Your Honor, I don't know if everyone in the  
13 room has this statement.

14 MR. ENGLISH: Yes, everybody has it.

15 JUDGE BAKER: Yes.

16 MR. ENGLISH: All of your statements have been  
17 passed out.

18 THE WITNESS: Okay.

19 MR. ENGLISH: All four exhibits.

20 THE WITNESS: Then I'd ask the reporter to type  
21 in the proposal.

22 JUDGE BAKER: Very well. Mr. Reporter, if yo  
23 will type that in, please. Thank you.

24 "Section 1001.7 Pool Plant.

1           1. Amend Section 1001.7C(1) and (2) to increase  
2           the applicable shipping percentages by 5 percent over the  
3           entire qualifying period August through December each  
4           year. The revised rate in Subparagraph (1) for August and  
5           December would be 15 percent and the performance standard  
6           contained in Subparagraph (2) for each of the months  
7           September through November would be 25 percent of  
8           receipts.

9           2. Remove Paragraph (h)() which authorizes  
10          split plants, pool and non-pool segments, in the same  
11          plant facility."

12           THE WITNESS: Justification. Since the  
13          inception of the Reform Order, a major milk drain has been  
14          taking place in the Northeast in the Fall months, making  
15          it increasingly difficult for fluid milk handlers to  
16          procure enough milk to satisfy demand. This drain occurs  
17          largely because spot milk is moved from the Northeast to  
18          other areas by transfer, diversion or shift of producers  
19          at seasonally high prices, without having to maintain  
20          appropriate association with the Northeast Order for  
21          pooling purposes.

22           While milk has not been as tight this year  
23          compared with 2000 and 2001, we think the situation will  
24          change markedly during September through November 2002

1 and, I would add, during 2003. We also are aware that  
2 some of the extra milk in the market this Spring and early  
3 Summer stems from earlier switching or dumping milk back  
4 into the Northeast from Southeastern Order areas where it  
5 had been used as reserve milk.

6 Therefore, Proponents think long-term action is  
7 needed to alleviate the milk shortages regularly occurring  
8 in the Fall for Order 1 fluid milk handlers as well as  
9 corrective measures to lessen the extent to which Federal  
10 Order 1 carries the reserve milk for other market areas.  
11 We think this can best be accomplished by raising the pool  
12 performance standards in the Fall when the milk is needed  
13 most. An increase in the shipping standards is made  
14 necessary because we find that an increasingly greater  
15 share of the milk in the Northeast is being leveraged via  
16 revised cooperative 9-C provisions to favor the needs of  
17 some handlers over others, creating inequities and  
18 disorderly marketing in the process. Our proposed 5  
19 percent increase in the shipping requirement under  
20 Proposal Number 2 will do much to correct the Fall milk  
21 shortage problem provided other safeguards, such as an  
22 effective call provision, is also maintained in the Order.

23 While we recognize the common desire among  
24 handlers to market their milk to best advantage, we also

1 consider it the prime responsibility of Order provisions  
2 to assure that an adequate supply remains to fulfill the  
3 Class 1 needs of Marketing Area consumers. It is  
4 appropriate, therefore, for the Order to allow the  
5 complete withdrawal of producer milk during July through  
6 November each year, followed by a repooling of the same  
7 milk in Order 1 in the flush production season. This  
8 unduly burdens both handlers and producers who then wind  
9 up having to carry the surplus reserves otherwise  
10 associated with another market.

11 The proposed 5 percent increase in  
12 qualification requirement during August through December  
13 is modest and not without precedent. The resulting  
14 shipping standards are similar to those previously in  
15 effect in the former New England and Middle Atlantic  
16 Orders prior to the merger in 2000, and they match those  
17 established August through November 2000 and 2001 under  
18 the call orders promulgated by the Market Administrator.

19 To fully appreciate the current pool  
20 qualification issues in the Northeast, one must understand  
21 the significant structural changes that have been taken  
22 place in the market since adoption of the Reform Order.  
23 Perhaps the most important change affecting pool  
24 qualification is the new cooperative 9-C provisions

1 adopted under Reform. Another involves the loose pooling  
2 requirements, particularly with respect to allowable  
3 diversions and the degree to which producer milk must  
4 touch base with pool plants in the primary market.

5 The new 9-C provision, Section 1001.9,  
6 Paragraph C, has placed the larger Northeast cooperatives  
7 in a strong position to direct a larger share of milk,  
8 market milk to best advantage wherever it may be most  
9 needed. The issues are, to which markets, and for whom,  
10 and for how much?

11 Prior to Order Reform, the New England Order  
12 had a similar 9(d) cooperative pooling provision but it  
13 was restricted to members only. This difference is  
14 important because the current 9-C standards permit other  
15 cooperatives, normally smaller, and independent producers  
16 to join the 9-C unit of a larger cooperative willing to  
17 take the responsibility to pool the milk and direct its  
18 markets. Subsequent merger activity among milk dealers  
19 coinciding with other changes in corporate market  
20 structure within the region has resulted in the shifting  
21 of large blocks of independent producers primarily  
22 associated with pool distributing plants into these larger  
23 co-op 9-C units. This gave the cooperative 9-C units  
24 involved a leading edge i pool qualification ability due

1 to the high degree of shipments to Class 1 pool  
2 distributing plants made possible by the added  
3 independents. The 9-C cooperative pooling advantage for  
4 some has reached the point that an increase of 10 to 15  
5 percent in shipping requirement should not pose a  
6 qualifying problem for the parties. That is, unless they  
7 misuse it to pool too much manufacturing milk or sell too  
8 much milk to other markets, most notably to the Southeast.

9 This 9-C unit pooling advantage is now being  
10 used extensively to leverage the inclusion of other  
11 independent producers and smaller cooperatives associated  
12 primarily with manufacturing operations into their  
13 expanded 9-C unit for the privilege of guaranteed pooling  
14 at a service fee. The degree to which the cooperative  
15 decides to take on the pooling responsibility for  
16 additional manufacturing milk directly affects their  
17 ability to respond to our proposed higher shipping  
18 standards. And what has happened as a result of extending  
19 the pooling guarantee? The answer is fewer and fewer  
20 sources of reserve milk supply for fluid milk handlers and  
21 that is our main concern for the future.

22 According to the Handler Location Index  
23 released by the Market Administrator in April 2001, only  
24 nine of the 150 Northeastern plants listed as partially or

1 fully regulated or exempt under Order Number 1, were  
2 classified as pool supply, PS, plants. Prior to Order  
3 Reform, there used to be more. Of the nine pool supply  
4 plants remaining, only three are proprietary, Fleur-de-  
5 Lait in New Holland, Pennsylvania, Queensboro Farms in  
6 Canastota, and Emkay Trading in Arcade, New York. The  
7 rest are cooperatively owned. While one might suggest the  
8 reduction in number of pool supply plants was simply the  
9 result of plant closings, such conclusion does not hold  
10 up. Why? Because several of the former reserve pool  
11 supply plants simply converted to non-pool status. And  
12 the change in status was made easier with "guaranteed  
13 pooling" and unlimited diversion privileges under Order  
14 Reform.

15 The extent to which cooperative 9-C milk has  
16 been gaining market share is clearly demonstrated in Table  
17 2.

18 MR. ENGLISH: Exhibit 26.

19 THE WITNESS: Thank you. Table 2 of Exhibit  
20 26.

21 This table gives a breakdown of total market  
22 milk produced by cooperatives and independent producers.  
23 It also shows the market share represented in the expanded  
24 9-C units. From the data in Table 2, we find that average

1 milk production covered in 9-C units is now greater than  
2 total co-op milk receipts by more than 100 million pounds  
3 a month. We also call attention to the fact that 9-C milk  
4 now represents more than 80 percent of all milk produced  
5 for the Northeast Order. Consequently, it is imperative  
6 that all cooperatives understand that the market tools  
7 provided them under current 9-C provisions carries with it  
8 awesome responsibility to see to it that consumer fluid  
9 milk needs in Order 1 are given top priority at all times.

10 The second amendment to the pool plant  
11 definition proposed by our group, officially noticed in  
12 Proposal Number 2, called for the removal of Paragraph  
13 (h(7) set forth in Section .7 of the Order. We note, too,  
14 that identical amendment is proposed by the Association of  
15 Dairy Cooperatives in the Northeast.

16 The provision is designed to enable special  
17 split-plant status, both pool and non-pool within the same  
18 facility, is proposed to be removed.

19 Justification. The new Reform Order has been  
20 too liberal in its pooling standards. Since its inception  
21 in January 2000, the Reform provisions have encouraged  
22 abusive pool riding practices. This provision is one of  
23 them. It no longer serves the purpose for which it was  
24 originally intended and could be used to the detriment of

1 orderly marketing procedure.

2 Original purpose of the split-plant designation  
3 was to set aside a portion of receiving facilities as  
4 "non-pool" to receive and handle Grade B milk, separate  
5 from Grade A milk received at the "pool" section of the  
6 handler's facility. We understand the provision is not  
7 normally approved by the Market Administrator except for  
8 this purpose. For example, we understand it might be used  
9 to separate non-pool Grade B Amish-produced milk from  
10 other Grade A milk in the plant.

11 The problem with it, however, is that, once  
12 approved, it provides a means whereby the handler may  
13 establish a pooling pattern very detrimental to the public  
14 interest and orderly marketing. The underlying problem is  
15 that this provision may be used to ride the pool,  
16 especially if the Order enables unrestricted diversions,  
17 as the Northeast Order presently does. Milk from distant  
18 split-plants can be readily pooled and qualified under  
19 Order 1 with minimal shipments during the qualifying  
20 period. After full qualification is achieved, the handler  
21 may then add substantially to receipts at the pooled  
22 portion of the plant beginning January 1 and continuing  
23 through July 31 while at the same time continuously  
24 diverting milk to non-pool plants. Most importantly, it

1 could provide the means to draw the higher producer price  
2 differential from the Order 1 pool without ever making a  
3 meaningful contribution to the market.

4 Since it is our understanding the provision is  
5 not currently being used by handlers located within the  
6 Order 1 Marketing Area, we concur with the ADCNE  
7 cooperatives that it be removed from the Northeast Order  
8 as soon as it is practicable to do so.

9 This concludes our statement on Proposal Number  
10 3.

11 MR. ENGLISH: And finally, Exhibit 37, your  
12 one-page statement on Proposal Number 4.

13 THE WITNESS: All right. I do want to make the  
14 observation at this point that I may want -- I will want  
15 to come back to Proposal 3 with regard to a suggestion  
16 modification of our position.

17 MR. ENGLISH: We will do that.

18 THE WITNESS: Proposal Number 4. This proposal  
19 had previously been included among the group of date  
20 changes contained in Proposal Number 1 but later separated  
21 by the Department to be included jointly in jointly with  
22 the ADCNE cooperatives and the Market Administrator as  
23 Proposal Number 4.

24 The date change amendment in Proposal 4 in

1 Section .72 would require that the Market Administrator  
2 make payment to handlers from the Producer Settlement Fund  
3 each month no later than the day after handler payments to  
4 the Producer Settlement Fund are received. Current  
5 provision in Section .72 requires such payment from the  
6 Producer Security -- Settlement Fund be made no later than  
7 the 16th day after the end of each month, unless such date  
8 fell on the weekend or national holiday, in which case  
9 payment is made no later than the next business day,  
10 pursuant to Section .90. This exception in Section .90  
11 would apply under Proposal 4 as well.

12 The jointly-sponsored amendment is needed  
13 because problems have risen for the Market Administrator  
14 since Order Reform in clearing funds in those months when  
15 payment to the Producer Settlement Fund, pursuant to  
16 Section .71, and payment from the Producer Settlement Fund  
17 under Section .72 happen to fall on the same day. At  
18 least one day is needed between the respective payment  
19 dates to assure sufficient funds are available for  
20 payments to handlers pursuant to Section .72.

21 In 2002, same-day Producer Settlement Fund  
22 payment dates arise three times, May, August, and  
23 November. This is shown in or Table 1, Exhibit 26.

24 The proposed amendment fits other date-change

1 proposals advanced by NYSDFI at this hearing and conforms  
2 with sound business practices. We urge its adoption.

3 JUDGE BAKER: Now may the witness be  
4 questioned, Mr. English?

5 MR. ENGLISH: I have a couple thing, Your  
6 Honor.

7

8

9

DIRECT EXAMINATION

10 BY MR. ENGLISH:

11 Q With reference to Proposal -- sorry -- Exhibit  
12 24 yesterday that was entered in the record, Mr. Arms, I  
13 believe that it was just provided to you a moment ago.  
14 After reviewing Exhibit 24 and the tables that appear in  
15 Exhibit 24 that was not read into the record but is part  
16 of the exhibit, do you have a correction for the record?

17 A Yes, I do.

18 Q And what is that correction?

19 A The correction is the listing of New York State  
20 Dairy members, Byrne Dairies, Syracuse, New York, should  
21 be shifted from that list to the one below it, which is  
22 Other Northeast Dairy Processing Companies in Favor of  
23 these Proposals. Their membership status changed to put  
24 their position in favor of this proposal.

1 Q Now, a moment ago, you mentioned that there was  
2 a modification to the position. Let me ask you first.  
3 You've sat here throughout the hearing, correct?

4 A Yes, I have.

5 Q And you've heard both the examination of the  
6 witnesses by Mr. Beshore and you have considered the  
7 question of the so-called free ride credit, correct?

8 A Yes, sir.

9 Q And have you reached a conclusion about what  
10 the -- what the issue really is there in terms of New York  
11 State Dairy Farmers Association?

12 A Yes, sir.

13 Q And -- and what is that?

14 A The ADCNE Proposal 5, I believe it is, --

15 Q Yes.

16 A -- requiring a 10 percent shipping standard in  
17 the flush months from the get-go had considerable merit,  
18 but in our view, in our perspective, only with respect to  
19 application to sources beyond the Northeast Order area.

20 Q The plants?

21 A Distant sources.

22 Q The plants?

23 A Yeah. The plants in the distant states that  
24 are currently or have been -- strike the word "currently",

1 that did ride the pool.

2 Q That did until August 1st when they, according  
3 to the testimony of their own witness, went off on August  
4 1st, correct?

5 A Right.

6 Q And so, the position or modification you're  
7 suggesting to Proposal 5, which is not your proposal but  
8 since others have been asked about it and you may well be  
9 asked about it, the modification is that to the extent a  
10 10 percent shipping requirement is applied to supply  
11 plants, that it be applied to supply plants located  
12 outside the Marketing Area, correct?

13 A Yes. The reason we do not support it for  
14 handlers within the Northeast area is really a quite  
15 simple one and that is, especially March, April, May,  
16 June, the milk is not needed, and we fail to see any  
17 economic sense of forcing our pool supplies that are  
18 located within the Northeast area, forcing them to make  
19 shipments to the primary market only to make -- only  
20 having to make arrangements to back haul the milk back.

21 Your Honor, I know this has been done in the  
22 past, and so we feel it needs to be -- it needs not to be  
23 applied to such sources within the market.

24 MR. VETNE: Your Honor, I cannot accept that on

1       behalf of Friendship.

2               JUDGE BAKER: Mr. English, are you through?

3               MR. VETNE: No, I have an objection.

4               MR. ENGLISH: Just one second. Why don't we go  
5 off the record one second?

6               (Discussion off the record.)

7               MR. ENGLISH: Before Mr. Vetne makes his  
8 objection.

9               BY MR. BESHORE:

10              Q     Mr. Arms, we -- we -- you discussed this with  
11 the members. Were you thinking about the Marketing Area  
12 as being sort of the Marketing Area covered by the states  
13 in which the Marketing Area encompasses? In other words,  
14 were you including all of New York or just the part of New  
15 York that's the Marketing Area?

16              A     No. I -- I don't believe my testimony referred  
17 to Marketing Area. I think it referred to Northeastern  
18 states.

19              Q     So, -- so, in other words, to the extent that -  
20 - that by way of example, Friendship is located one county  
21 outside the Marketing Area, you did not intend by way of  
22 this modification to extend that to that; you mean the  
23 Northeastern states?

24              A     You do not see the necessity to have forced

1 shipment from Friendship or any other pool handler in that  
2 --

3 Q In which pool handlers lie?

4 A Yes, in those months.

5 Q All right. So, with that clarification --

6 A It's an uneconomic shipment.

7 MR. ENGLISH: that clarification, Mr. Vetne may  
8 still rise, but maybe that will alter it a little bit.

9 MR. VETNE: Your Honor, I have two objections,  
10 one of which is specifically related to Friendship and  
11 that has been resolved, and I thank you, Dave, for that  
12 clarification.

13 But I -- I -- I -- I have to rise, also, to  
14 -- to voice an objection that this new proposal raises a  
15 question of differential burdens and standards for milk  
16 supplies inside and outside of the Marketing Area which  
17 were not included in the hearing notice and concerning  
18 which we spent some time in Federal District Court in  
19 Milwaukee addressing for the milk for the Mideast Market  
20 where it was also not in the hearing notice.

21 JUDGE BAKER: What were the results, Mr. Vetne?

22 MR. VETNE: Pardon?

23 JUDGE BAKER: What were the results?

24 MR. VETNE: The result wasn't and an appeal is

1 pending, Your Honor. But in that -- in that case, and in  
2 the Mideast, as -- as it happened, there are folks who did  
3 not come to Ohio to appear because there was nothing in  
4 the notice, and so when it came up in the hearing, it  
5 slipped by because people weren't there. I wasn't there  
6 in particular because I had been informed that -- that  
7 things were negotiated and there was going to be no  
8 adverse impact, and it's hard for people who are not there  
9 to voice an objection when it comes up.

10 So, I've been asked to monitor that for  
11 purposes of this hearing and to give notice of -- of  
12 objection because it created differential standards for  
13 which the parties, not just in the Midwest but parties  
14 elsewhere, had no notice. So, that's -- that's the extent  
15 of my objection, not on behalf of Friendship in this case  
16 but because I didn't represent the parties elsewhere who -  
17 - who did not come and are concerned about this kind of  
18 thing philosophically and legally, and on the grounds that  
19 it was not noticed, I would object to this modification  
20 for differential burdens inside and outside. That's all.

21 JUDGE BAKER: Very well. Thank you, Mr. Vetne.  
22 Thank you for your erudite recitation.

23 MR. ENGLISH: Your Honor?

24 JUDGE BAKER: Yes, Mr. English?

1           MR. ENGLISH: In no fewer than four proposals  
2 is Paragraph (c)(1) which has been proposed to be amended  
3 by a number of parties open for consideration, and indeed  
4 one of the proposals is Proposal Number 5, that in each of  
5 the months of January through August and December, such  
6 shipments must be for not less than 10 percent of the  
7 total quantity of milk that's received at the plant.

8           So, plants located outside are on notice that  
9 as a result of this hearing, they could be subjected to a  
10 rule of 10 percent shipments, that as a reasonable  
11 modification of our proposal, it is perfectly rationale to  
12 say, to have an exception for that, and the exception  
13 allows the rules to apply to everybody, but the proposal  
14 is open, and the Court in Milwaukee specifically found  
15 that once a Notice of Hearing is out there, the parties  
16 participate or don't participate at their own risk,  
17 especially when you're looking at (c)(1) being open in  
18 this hearing, and -- and the fact of the matter is, this  
19 is far more direct and -- and nonetheless the Court in  
20 Milwaukee found without any difficulty that the issue  
21 there with respect to a plant treatment, qualification for  
22 a plant and how to qualify milk, was open for  
23 consideration. That's what this hearing is all about, and  
24 there's been a lot of discussion about this in supplies,

1 and frankly, (c)(1) plainly indicates that the question of  
2 whether or not you're inside or outside, the question of  
3 what you're going to have to ship is an issue, and the  
4 fact that we have said as an appropriate modification, we  
5 don't want plants inside to be subjected to that, such as  
6 Friendship, doesn't change the fact that we are allowed to  
7 testify that the proposal would be appropriate if applied  
8 outside.

9 MR. VETNE: I need to add just one thing and  
10 concede that in some very modest respect, Chuck English is  
11 correct, and that is, that the issue that arose in the  
12 Mideast involved an unnoticed new regulatory burden and  
13 the -- the question here involves the mitigation or  
14 alleviation of a burden that was noticed. So, to that  
15 extent, the issues are different, and, you know, for that  
16 purpose, there may be a different analysis by the  
17 Department.

18 Thank you.

19 JUDGE BAKER: Very well. Thank you.

20 THE WITNESS: Your Honor?

21 JUDGE BAKER: Yes?

22 THE WITNESS: There's another basis for the  
23 modification, which I'd like to get into the record.

24 JUDGE BAKER: Very well. We'll do that later.

1       What is involved here, I think Mr. English and Mr. Vetne  
2       are both aware of the legal question, and ultimately, it  
3       will be decided. Most of these hearing notices do provide  
4       for appropriate modifications of the matters noticed for  
5       hearing. Of course, it goes to the question of what a  
6       reasonable person would consider within the ambit of an  
7       appropriate modification.

8                 With respect to seeking an appropriate  
9       modification here, I will let it in. If the Department in  
10      its wisdom decides later on that it is inappropriate or if  
11      the Court rules that -- the Appeals Court rules in the  
12      meanwhile, then there will be a guidance for the  
13      Department to proceed from.

14                But thank you all for -- for keeping all our  
15      legal principles at the forefront.

16                THE WITNESS: Your Honor, may I consult with  
17      legal counsel for a moment?

18                JUDGE BAKER: Which one?

19                THE WITNESS: Mr. English.

20                (Laughter)

21                (Discussion off the record.)

22                BY MR. ENGLISH:

23                Q     And just to be clear, Mr. Arms, this is -- this  
24      is a portion of Proposal 5 you can agree we can modify,

1 but you don't necessarily agree with all of the content of  
2 Proposal 5, correct?

3 A Correct.

4 Q And -- and that is, that you discussed at some  
5 length the issue on 9-C milk, and to the extent that's in  
6 here, your testimony on 9-C milk, Proposal 5, you're not  
7 saying adopt Proposal 5 with this one modification, you --  
8 your whole testimony has to be considered with respect to  
9 Proposal 5, correct?

10 A Yes, sir.

11 JUDGE BAKER: Very well.

12 MR. ENGLISH: The witness is available for  
13 cross examination.

14 JUDGE BAKER: Are there questions, Mr. Vetne?

15 MR. VETNE: Probably.

16 CROSS EXAMINATION

17 BY MR. VETNE:

18 Q You offered that a modification to Proposal 5,  
19 which addresses supply plant shipping requirements. Did  
20 you intentionally omit reference to your own Proposal 2 in  
21 that regard for a similar modification?

22 MR. ENGLISH: I think, for the record, what we  
23 need to say is that considering Proposal 5, recognizing  
24 there's a lot in the proposal that opens (c)(1) or the

1 whole area of (c) up for consideration, that with respect  
2 to the one issue of the January through July period, that  
3 is being addressed by this modification but it does not  
4 change the testimony he gave in the earlier statement.

5 MR. VETNE: Okay.

6 THE WITNESS: That is correct.

7

8 BY MR. VETNE:

9 Q I'm going to ask you -- you can go with me to  
10 Page 4 of your testimony on Proposal 2, Page 3, leading  
11 into Page 4. Your testimony there generally expresses  
12 some concern about pooling changes, correct?

13 A Yes.

14 Q Okay. You -- you intended it to encompass the  
15 universe in -- in that discussion of concern about pooling  
16 changes, structural changes for pooling in the Northeast?

17 A We think it has direct bearing on the current  
18 supply situation.

19 Q Okay. And then, you prioritize your concerns,  
20 as I understand it. The most troubling concern, as I  
21 understand your testimony, is that there's now new  
22 authority for 9-C milk in -- in New York that didn't exist  
23 before. That's Number 1, correct?

24 A That's correct.

1           Q     And Number 2 is that with respect to that 9-C  
2 milk, diversions are unlimited. That's the second basis  
3 of concern, correct?

4           A     I wouldn't necessarily put it in that order. I  
5 think I also expressed in the testimony, the statement,  
6 that we're very concerned about the guaranteed pooling  
7 status to some other cooperatives that are extended by the  
8 new 9-C provisions which result in the milk not being  
9 readily available.

10          Q     And so, would it be correct to say then that  
11 you'd combine the 9-C opportunity with unlimited  
12 diversions?

13          A     Yes, sir.

14          Q     And -- and that combination is your greatest  
15 concern?

16          A     Yes.

17          Q     Okay. And the third concern would be the touch  
18 base with pool plant requirement?

19          A     Well, yes.

20          Q     And you -- you said that, correctly, that --  
21 that there are fewer pool plants in the market, we've been  
22 over that a little bit, and that that hasn't happened  
23 because they closed. Your testimony on Page 5 concerning  
24 Exhibit 2 says several former pool supply plants simply

1 converted to non-pool status, and that the 9-C pooling  
2 opportunity for co-ops made that an issue, correct?

3 A Correct.

4 Q Is it your belief that the plants that formerly  
5 had pool status really didn't want to have pool status and  
6 they embrace this opportunity?

7 A Certainly each business entity is going to  
8 appraise their situation, and in the case of the handler  
9 with very high Class 2 use need to -- well, being that  
10 they might decide to go non-pool in order to pay into the  
11 Federal Order.

12 Q You heard the testimony of Warren Schanback,  
13 didn't you?

14 A Yes.

15 Q Okay. And Mr. Schanback indicated that the  
16 producers supplying that plant are now pooled through the  
17 cooperation of a cooperative. That's the 9-C kind of  
18 transaction that you were referring to, correct?

19 A Yes.

20 Q Okay. And you also heard Mr. Friendship say  
21 that he really didn't want to be non-pooled and he made  
22 all kinds of efforts to try to remain in the pool? You  
23 heard him say that?

24 A I did.

1 Q Okay.

2 A That doesn't pertain or isn't completely  
3 relevant of what -- to my statement.

4 Q Well, the impression I got from your statement  
5 was that -- that the pool plants that continued in  
6 existence, pool supply plants that continued in existence  
7 of which as pool plants you said, that they did not  
8 achieve pool status because that's what they really  
9 wanted?

10 A The bottom -- may I be clear?

11 Q Please.

12 A The bottom line is that the 9-C provision is  
13 being used to leverage a high Class 1 volume on one side  
14 in order to guarantee pooling on another side to another  
15 group, and as a result, the milk to which the guaranteed  
16 pooling has been provided is no longer available to the  
17 market because they do not have to ship it. They're  
18 automatically qualified by the larger 9-C unit.

19 Q You're aware that Friendship served as a source  
20 of -- as a pool supply plant served as a source of  
21 supplemental milk pre-Reform when there was a call or  
22 threat of a call, correct?

23 A Correct. This statement, incidentally, is not  
24 directed at Friendship per se. It's directed at a

1 situation at a number of places.

2 Q A number of places in relation to the ability  
3 of those places to have milk pooled through cooperative 9-  
4 C transactions?

5 A And to not make them available to fluid  
6 handlers.

7 Q Is there any situation that you have in mind  
8 when you say, made your last statement, that does not  
9 involve a 9-C handler?

10 A Can you repeat the question?

11 Q Your statement, if I can paraphrase it,  
12 concerned that manufacturers could pool, can pool and do  
13 pool through 9-C unit and not make their milk available.  
14 My question then was, are you aware or have a concern of  
15 any particular situation in which 9-C is not part of the  
16 equation producing the problem?

17 A Yes, there are other problems more pronounced  
18 in 2000 and 2001, mainly a rather very large shift of milk  
19 to the Southeast.

20 Q Okay.

21 A And that milk was not readily available.

22 Q Okay. And was that shipped by entities other  
23 than 9-C handlers?

24 A I'm aware of some, yes.

1           Q     You -- you belong -- at the top of Page 5, if  
2     you have two or fewer sources of reserve supply milk are  
3     available for the fluid handlers, one of those pre-Reform  
4     sources was Friendship in order to retain its status as a  
5     designated pool supply plant. That is one of the sources  
6     that is no longer available post-Reform, correct?

7           A     I'm not so sure it's not available. It could  
8     possibly be made available by Friendship if they choose to  
9     do so or -- or it could be made available by the 9-C  
10    cooperative involved. They -- they may call for it.

11          Q     Yes, but Friendship no longer has a  
12    responsibility as they did before to make a supply  
13    available in response to a call?

14          A     I assumed that, but I do not know it for a  
15    fact. I cannot answer for the Friendship operations.

16          Q     Friendship has described its milk as being  
17    pooled by somebody else. Part of the problem that you see  
18    is that the fact that that milk is now no longer pooled  
19    and marketed in Friendship's control leaves you with one  
20    fewer sources of reserve supply milk?

21          A     I'm an economist, and I know the handlers  
22    respond to economic facts of life. It is a fact that, I  
23    believe public knowledge, that Friendship has been able to  
24    leave the pool at times and come on to the pool when it

1 was to their advantage when the Class 2 price was such  
2 that it was favorable relative to the blend and vice  
3 versa. There are a lot of different -- that's the rule.  
4 To me, at the same time, I work for another client, the  
5 H.P. Wood Company, which makes this same product at  
6 Vernon, and that plant has been fully pooled the whole  
7 time and paid into the Producer Settlement Fund when the  
8 Class 2 price was high.

9 I -- I see that it causes -- definitely causes  
10 some inequities among handlers, and I think this is  
11 contrary to the purposes of the Act.

12 Q So, it would be a good idea then to have  
13 Friendship pool continuously?

14 A No. I -- please don't put words in my mouth.  
15 I think that it becomes a decision, an economic decision,  
16 depending upon what the rules are, and so I have no  
17 comment to make on that.

18 Q Oh, no comment. Okay. Do you know how the  
19 Dairy Farmer Market provisions work in Order 1?

20 A I'm familiar with them. In fact, I'm familiar  
21 with its origin.

22 Q Isn't it true that it is extraordinarily  
23 difficult and there are huge disincentives to take milk  
24 off the pool to take advantage of a price diversion?

1           A     And rightfully so, in our opinion.

2           Q     So, your answer is yes?

3           A     Yes.

4           Q     Have you -- you refer on Page 3 in the first  
5 full paragraph to a "prime responsibility, the prime  
6 responsibility of the Order provision is to ensure an  
7 adequate supply of Class 1 milk." I'm aware that the  
8 pricing provision of the statute in Section 608(c)(18)  
9 addresses adequate supply of milk.

10                   Are you aware of any other provision of the Act  
11 that would correspond with your assertion of the purpose?

12           A     I'm an economist and not an attorney.

13           Q     Okay.

14           A     But I would add that I do believe the  
15 cooperatives recognize that the Class 1 price carries with  
16 it a differential that then accrues to the benefit of all  
17 producers in the market a very significant magnitude such  
18 that they certainly should give priority to the fluid  
19 needs of the market.

20           Q     As an economist, you agree that milk ought not  
21 flow to a bottling plant when it's not needed?

22           A     I believe that was the basis of our  
23 modification suggestion to Proposal 5 because we are in  
24 agreement essentially that it doesn't make economic sense

1 to force milk down through the market if it's -- in those  
2 months when there is a large surplus and it only makes  
3 matters worse.

4 Q Milk can move to a market when not needed, even  
5 outside of the scope of your modification?

6 A I think one needs to take into account in the  
7 Northeast Order, as Mr. Gallagher has pointed out, to make  
8 a market, that milk has to move considerable distance and  
9 it just doesn't make sense to have so much freight charged  
10 and, incidentally, under the new Order, it's charged to  
11 the producer because his price is at the plant that first  
12 receives it. So, I think it's uneconomic.

13 Q You also make a reference to -- on Page --  
14 bottom of Page 4 to "the specter of somebody pooling too  
15 much manufacturing milk". Is it your testimony that  
16 there's some manufacturing milk in the milkshed that maybe  
17 shouldn't be pool eligible or have pool access? By  
18 manufacturing milk, I mean Grade A milk eligible for the  
19 fluid use, that is needed for fluid use, that some of that  
20 should just be included out of the pool.

21 A My statement referred to contractual  
22 obligations that might be made by cooperatives with  
23 manufacturers for pool supply contracts without waiver in  
24 such contracts to cause -- to enable the cooperative to

1 draw a -- a supply from it to meet a critical need for  
2 fluid milk. That's primarily what I said.

3 Q Okay. You -- you did not intend then to suggest  
4 that there should be a limit to the amount of the excess  
5 reserve that is pool eligible or has pool access?

6 A I did not intend to limit the scope of the  
7 number of plants or anything like that in the Northeast,  
8 manufacturing plants.

9 MR. VETNE: I think that's all I have for now.  
10 Thank you.

11 JUDGE BAKER: Thank you, Mr. Vetne.

12 Are there other questions? Mr. Beshore?

13 CROSS EXAMINATION

14 BY MR. BESHORE:

15 Q Mr. Arms, I want to -- I want to get your  
16 statement on Proposal 1 first. Have you -- have you  
17 calculated how much Proposal 1 would -- would cost dairy  
18 farmers?

19 A I have not. However, I've given it some  
20 thought, and knowing the argument might be that producers  
21 lose a certain amount of money for each day that the  
22 payment date is extended, there are offsetting monies that  
23 are coming to pool producers and cooperatives that have --  
24 that have not been taken into account.

1 Q You're adding that under Proposal 1?

2 A What I want to say is that under the Reform  
3 Order and the current 9-C provisions, we have added, as my  
4 data have shown, very substantially to the total 9-C  
5 volume, and that milk, whether it's independent or small  
6 co-op, to the extent it's added into the 9-C unit, enjoys  
7 all the rights and privileges extended to 9-C milk, and so  
8 therefore, you have a large volume of milk, fully  
9 independent milk, that's now being paid for as cooperative  
10 milk at the earlier date. So, that tends to offset.

11 Q That's -- the provision you're referring to is  
12 in the Order since Order Reform?

13 A We're trying to point out that under Order  
14 Reform, the advanced date of payment moved way up from  
15 where it was, and --

16 Q You --

17 A -- in addition, -- no. Only to the extent as  
18 in the proposal, but I'm trying to also point out that  
19 there's a lot more milk that's being paid for early  
20 because of the revised 9-C.

21 Q The reason I asked that question was because  
22 some of the same handlers that you're testifying for here,  
23 when producers requested a modification of the rate of  
24 advanced payment with a possible first year stamp and some

1 of the same parties were very interested in having a CPA  
2 calculate very carefully what that change, that 5 percent  
3 change in the rate of payment on the partial would  
4 supposedly cost those handlers.

5 Now, here, you've pushed it the other way, and  
6 I wondered if you had made the same calculation.

7 A No, I have not.

8 Q Okay. You've asserted on Page 3 of your  
9 testimony in support of Proposal 1 that handlers should  
10 not be penalized for failing to meet reporting deadlines.  
11 You're not -- you're not penalizing them in any way by the  
12 Order if you get your report in a day late, are you? I  
13 mean, are you?

14 A I have not.

15 Q Based on --

16 A I believe a handler has to get his report in on  
17 time and is subject to penalty. That's -- certainly that  
18 is true with regard to payment.

19 Q Oh.

20 A But not to the Producer Settlement Fund.

21 Q Okay. So, whatever penalties are in the Order  
22 for filing a day late, that's what you're referring to on  
23 Page 3?

24 A Yes, and one thing leads to another and it

1 could wind up there, but there's another concern. We have  
2 asked for another day here to restore the 10th which we  
3 had before as the reporting date. We are concerned that  
4 the additional time will be taken up and now we're  
5 beginning -- we may be getting reports late on the 10th.  
6 So, we didn't propose the change, but in retrospect, it  
7 probably would have been advisable to keep the 9th as the  
8 date for vendors to verify their data with the handlers so  
9 that the handlers can get their reports done on time.

10 Q Now, is it your position that the industry can  
11 never meet the reporting dates in the current Order?

12 A We propose that they change that and assume the  
13 cooperatives will need it.

14 Q But is it --

15 A It's better.

16 Q Is that because you think that it's impossible,  
17 physically, clerically, administratively impossible, for  
18 the industry to meet the dates in the current Order?

19 A It seems with the expansion that has taken  
20 place and all the structural changes that I have mentioned  
21 in my statement, that it is getting increasingly  
22 difficult.

23 Q Are people learning how to do it? Isn't that  
24 what's going on?

1           A     It's not a question of learning.  It's a  
2 question of just being overwhelmed.

3           Q     So, you're saying it's physically impossible?

4           A     It's not physically impossible, but it's made  
5 it a lot more difficult.

6           Q     It would make your life easier if it was  
7 postponed, correct?

8           A     It would delay it to the date we had before it  
9 was restored.

10          Q     And with respect to -- with respect to Proposal  
11 2, your -- you -- you talk about milk going south to  
12 Southeastern Orders.  If milk from Pennsylvania or  
13 Maryland or New York, wherever it might be, has a better  
14 return because it's in the South and therefore is shipped  
15 down there and isn't even on this Order, how are increased  
16 shipping requirements in Order 1 going to address that  
17 issue at all?

18          A     Cooperative 9-C units will need to respond to  
19 those standards, and while they send milk -- a lot of milk  
20 to the South, that milk is available for them to ship back  
21 necessarily and they likely will.

22          Q     Actually, if milk goes south out of the 9-C  
23 unit, that reduces the total volume in that -- assume 9-C,  
24 that reduces -- and it's pooled on Southern Order, that

1 reduces the total volume in that 9-C unit and makes it  
2 easier to meet whatever standards there are with the same  
3 amount of 7-A shipments, doesn't it?

4 A It's still 9-C milk which can be transferred.

5 Q If it's pooled in the other Order, --

6 A No, I didn't say that it was pooled on the  
7 other Order.

8 Q Oh, so, you're concerned with milk that's  
9 transferred only?

10 A Yes, and that's in large volume. No, I didn't  
11 say all milk. We're aware of that.

12 Q Now, the 9-C problem that you've talked about,  
13 if you look at the -- if you look at the 9-C handler list  
14 on Exhibit 5, can you tell us which 9-C units are causing  
15 a problem on Page 18?

16 A I think my statement speaks for itself. I am  
17 not going to go through this list. I can cite perhaps one  
18 or two examples, but I'm not going to go through this  
19 list. It's not necessary. The principle is that there is  
20 guaranteed pooling extended to some smaller co-ops which  
21 may make the milk available or may not because they have  
22 guaranteed pooling for which they are paying the larger  
23 co-op for that service.

24 Q Okay. If the largest 9-C unit in the Order has

1 shipments to distributing plants in aggregate considerably  
2 above any performance standard in your proposals, is that  
3 going to have any impact on them?

4 A You have put your finger right on the problem  
5 because what has changed is that if the requirement is set  
6 at 45 percent, some of the 9-C units are already over  
7 that. It doesn't bother them a bit. They don't have to  
8 ship any milk to them. That's the problem.

9 Q But that bothers you?

10 A It bothers our -- I'm speaking for fluid milk  
11 handlers, and it takes from, it reduces the number of  
12 sources competing, that may compete to ship their milk to  
13 fluid milk handlers.

14 Q So, you're bothered by the fact that the  
15 largest, you know, 9-C handler in the Order has over --  
16 well over any minimum shipping requirements you propose,  
17 and your -- but you can't reach within that unit the  
18 sources of milk that you would like to on an individual  
19 instead of aggregate basis?

20 A I -- I think my statement is clear, that the  
21 milk may be available but under -- certainly under  
22 different terms.

23 Q Price?

24 A Price and/or milk.

1 Q Now, --

2 A The point is they don't have to ship any more.

3 Q And -- and -- and imposing a 25 percent  
4 shipping requirement on somebody who's already shipping  
5 40-45 isn't going to do any good, is it?

6 A In this market, Marvin, the Class 1 level is  
7 high enough so that in August through December, there  
8 should be no problem in meeting standards we used to have  
9 throughout most of this Northeast Order.

10 Q Okay.

11 A It was never a problem in the Middle Atlantic  
12 Markets. The shipping percentage was higher in New  
13 England.

14 Q And it was lower in Order 2?

15 A But now, with the change in the structure  
16 that's taken place, it's -- it's become tighter.

17 Q Okay. The provisions of Order 2 always allowed  
18 9-C handlers to combine cooperatives or non-members of  
19 their -- on their -- in their units, isn't that correct,  
20 Mr. Arms?

21 A No, it is not correct, because they didn't have  
22 9-C units.

23 Q The bulk tank units?

24 A That's different. That's a different animal.

1           Q     They could combine non-members and cooperatives  
2     on that unit, could they not?

3           A     That's your statement. That isn't relevant to  
4     what I'm saying now with the Reform Order.

5           Q     And you're not aware that in the prior Order 1,  
6     cooperatives regularly pooled non-member milk on their 9-B  
7     units?

8           A     It was my understanding that 9-B units were  
9     limited to members. Perhaps somewhere along the line,  
10    that got amended, but if so, it's not to my knowledge. If  
11    that is true, I stand corrected.

12          Q     The -- the proposed diversion requirements  
13    would apply year-round, correct? Your proposed diversion  
14    requirements?

15          A     Yes.

16          Q     And so, even in the -- even in the Spring  
17    months, handlers of -- would be limited, 9-C or otherwise,  
18    would be limited in their ability to divert producer milk  
19    to non-pool plants to 75 percent of the milk, correct?

20          A     Yes, and that isn't very much different than  
21    the levels you -- your pool has proposed.

22          Q     Well, our -- our level's 90 percent, I think,  
23    is it not?

24          A     I'm not seeing a huge difference.

1 Q Okay. Well, is there --

2 A But our position is it should be tighter, not  
3 looser, because if -- if milk is diverted to those kind of  
4 levels, then it really isn't needed in the pool.

5 Q Is there milk capacity at -- at pool plants to  
6 pool all the milk that would need to be delivered to those  
7 plants under your proposal?

8 A My experience has been that it is not a major  
9 problem and I'll tell you why. What handlers do is they  
10 schedule milk into their plants from certain producers to  
11 serve certain routes and they may keep one route going for  
12 the first 10 days, switch to another route another 10 days  
13 or whatever, as necessary, to make sure they're not over-  
14 diverted.

15 Q Because there are good economic ways to  
16 organize the milk -- milk supply in the milkshed?

17 A In our view, if there -- if the milk is being  
18 associated with this market -- if milk is being associated  
19 from prior -- from as far away as the Midwest, --

20 Q I'm listening.

21 A Milk has been pooled in this Order by single  
22 shipment and then diverted very extensively at the non-  
23 pool plant out there, that's an example of milk that's not  
24 really needed here. Why should pool producers have the

1 burden of carrying the reserve of that other market?

2 That's our position.

3 Q That's your justification for a 75 percent  
4 diversion limitation?

5 A We feel it's a reasonable limit.

6 Q And in the Fall, --

7 A We don't feel there should be unlimited  
8 diversion and the 90 percent that you propose comes close  
9 to it. Ours is tighter. All of our provisions here are  
10 tighter but still reasonable in our opinion.

11 Q Now, under 75 percent diversion, in the Spring,  
12 that would apply in May, right?

13 A The higher diversion limits are in those months  
14 that are flush, yes.

15 Q Now, if, as Exhibit 5 shows on Page 74, in May  
16 of 2001, almost 800 million pounds of milk in the Order  
17 was diverted to non-pool plants, meaning, you know, that's  
18 where it was eventually received and processed, that  
19 diversion limitation is not going to -- that's more than  
20 25 percent of the milk in the pool, is it not?  
21 Considerably more, 800 million pounds.

22 A Unfortunately, we're dealing with a period when  
23 there was quite a bit of this outside milk. There was a  
24 lot of diversions, and quite frankly, we would expect that

1 our proposal, which I believe is the table in there, that  
2 our proposal would result in depooling as it existed, that  
3 handlers will revise their practices, and we submit that  
4 that level of depooling would not occur.

5 Q Well, you -- you've heard Mr. Schad's testimony  
6 that the plants in Minnesota and Wisconsin are not  
7 presently pooled under the Order?

8 A Yes, I did.

9 Q Okay.

10 A That's a good step in the right direction.

11 Q Well, even if you took a -- say you took a 100  
12 million pounds out of that 800 million that went to non-  
13 pool plants in May 2001, just to take the highest number  
14 out that was from those Upper Midwest poolings, you're  
15 still -- you still have considerably more than 25 percent  
16 of the pool going to non-pool plants, don't you?

17 A Marvin, I think handlers will adjust their  
18 procedures on how they divert milk and that at 75 percent,  
19 that is an ample diversion limit with which all handlers  
20 should be. That's our testimony. To the extent you feel  
21 differently, then your group is in the higher range. We  
22 think it's too loose.

23 Q And as you've testified, you support a zero  
24 percent shipping requirement for -- for pool supply plants

1 in the Northeastern states during January through July?

2 A Not really. Would you ask that question and  
3 leave out that the plant has -- in order to enjoy that,  
4 they must meet the performance standards the prior -- in  
5 the prior months, August through December, and that's a  
6 very important criterion, and if they do not, then they  
7 must ship 10 -- in order to stay in the pool in each of  
8 the months that you mentioned, they would have to ship the  
9 10 percent that you're proposing in each and every month.

10 Q By the way, the 9 -- under your -- under your  
11 Proposal 2, what would the plants not pooled during the  
12 Fall, what would it be required to ship during the January  
13 through July period?

14 A To the pool supply plant?

15 Q Yes.

16 A To remain pooled, it would have to meet the 10  
17 percent shipping requirement in each and every one of  
18 those months, if it didn't qualify in the preceding  
19 period. It has to earn its way is what I'm saying.

20 Q Thank you, Dave.

21 JUDGE BAKER: Very well. Are there any more  
22 questions? Mr. Tosi?

23 CROSS EXAMINATION

24 BY MR. TOSI:

1           Q     Mr. Arms, what -- what -- is it your position  
2     that we -- the Order has no diversion limits at this time  
3     for pool supply plants?

4           A     The diversion limits, I'm thinking, applies  
5     mostly to producer milk.

6           Q     Diversions, right? How about this producer  
7     milk that's pooled by supply plants?

8           A     I believe the qualifying rules there apply to  
9     the percentage of receipts at the supply plant which must  
10    be shipped, and if they in turn -- if your question is, do  
11    they -- if they in turn qualify during the August through  
12    December, then they -- yes, they do have and have earned  
13    the right to qualifying in the other months. That's my  
14    understanding.

15          Q     With respect to a limit on diversions, --

16          A     Oh.

17          Q     -- part of your testimony is in part that it's  
18    -- the pooling standards are a little too loose for the  
19    Northeast and some of it seemed to be --

20          A     The testimony was really directed towards  
21    diversion of producer milk.

22          Q     That's what I'm asking about. I know that  
23    right now, -- let me -- let me ask it this way. Wouldn't  
24    the diversion limits for a supply plant under the

1 Northeast Order now be 100 percent minus the applicable  
2 shipping requirement of the Order?

3 A Yeah. It'd have to meet the shipping  
4 requirement, yes.

5 Q So that, since we're saying you have to ship,  
6 for example, 25 percent of receipts in the diversion limit  
7 for that supply plant, then it's --

8 A It's inverse to the qualification in the  
9 requirement is what you're saying.

10 Q Right.

11 A I believe it is for the supply plants.

12 Q Okay. Also, to the extent that the Order  
13 currently provides the Market Administrator the authority  
14 to adjust shipping standards and diversion limits at least  
15 for -- and by extension diversion limits for supply  
16 plants, have -- have you or the people that you're here to  
17 represent ever requested the MA to adjust the shipping  
18 standard up or down?

19 A For pool supply plants?

20 Q Yes, sir.

21 A I'm not aware of any.

22 Q To -- to the extent that the Secretary's  
23 already granted authority to the Market Administrator to  
24 adjust such standards, why are we again asking the

1 Secretary to adjust something that authority's been given  
2 to someone to consider and adjust?

3 A We propose to keep that authority for the  
4 Administrator to --

5 Q Well, I understand that.

6 A -- adjust --

7 Q That part, I understand. But --

8 A Yeah. In the long-term, we feel that what  
9 transpired in 2000 and 2001 is going to be more of the  
10 long-term norm, especially with the changes taking place  
11 in the market.

12 Q Okay.

13 A So, we feel that that 5 percent standard,  
14 additional standard that was put in via call before should  
15 still pertain. Now, for example, this year, it -- we have  
16 had a significant change. Had those provisions been in,  
17 it might have warranted a call to reduce the percentage.  
18 However, as we look down the road, with the current pay  
19 prices to farmers being where they are at \$12+, these low  
20 prices, high feed costs, etc., we may find ourselves in  
21 2003 with just exactly the opposite situation, a shortage,  
22 a shortage of milk. So, what we're proposing is longer  
23 term.

24 Q Long-term or short-term, and I cannot remember

1 in which -- under which proposal you indicated something a  
2 situation that you're expecting to happen beginning now.  
3 I'm sorry. I'm trying to find it. I had marked it. I'm  
4 not quick enough here.

5 A It happens to us all the time with our senior  
6 moments.

7 Q Page 2. Sorry. Page 2 of Proposal 2 of your  
8 written statement. The situation -- beginning with the  
9 paragraph, "While milk has not been as tight this year  
10 compared with 2000 and 2001, we think the situation will  
11 changed markedly during September through November".

12 As a practical matter, this hearing could not  
13 correct that fast enough because --

14 A All I'm saying -- I realize that. All I'm  
15 saying is that there will be cycles up and down.

16 Q Okay.

17 A Now, what we are proposing is what we think is  
18 appropriate for the long-term.

19 Q Okay. And to the extent that we set a new  
20 number or whether we retain the current number by asking  
21 the Market Administrator to have you submit information to  
22 the Market Administrator with the justification why you  
23 think the number needs to go up or down, why are we asking  
24 the Secretary to do that now?

1           The Secretary's already given authority to the  
2 Market Administrator to take care of something as a matter  
3 of normal duties and as a matter of course to be  
4 responsive to the industry, and it -- it -- it might seem  
5 to the Secretary that this is redundant.

6           A     We don't see it quite that way, and the Market  
7 Administrator calls are to just up or down for a current  
8 situation, emergency-type situation, as opposed to longer-  
9 range planning by handlers as to what their requirements  
10 are, and we feel this is more important. The one's with  
11 the short-range and the other's longer range.

12          Q     Be it long or short, the Market Administrator,  
13 by the submission of adequate information and  
14 justification, can change those numbers to whatever it  
15 takes to maintain orderly marketing?

16          A     Yes, he can.

17          Q     So, why do we need to publish a new -- go  
18 through the effort here of coming up with a new set of  
19 numbers that only in turn would be changed either in the  
20 short run or the long run by the Market Administrator  
21 based on current marketing conditions?

22          A     I think our statement is saying that we think  
23 is needed because of the structural changes taking place  
24 in the market, and another consideration is at this

1 hearing, you have proposals, a whole range, one which  
2 hardly changes the standards, another that increases the  
3 standards under our proposal, and a third which decreases  
4 it, and so the same arguments could be used, the same  
5 questions could be asked.

6 Q Yes, and I did ask that of --

7 A Okay. And the same questions can be raised  
8 with them, and I would say we are concerned. We certainly  
9 don't want to go backwards and reduce the standards, and  
10 for the same reasons, we think that the standards we are  
11 proposing are appropriate.

12 Q You're not opposed to the Market Administrator  
13 continuing with the authority to adjust the standards that  
14 have been established under the Order for pooling?

15 A We not only are not opposed, we support it. We  
16 definitely want the call provisions to be there, to the  
17 extent they need it.

18 MR. TOSI: Okay. Thank you very much.

19 THE WITNESS: You're welcome.

20 JUDGE BAKER: That brings us to the time for  
21 our afternoon recess.

22 (Whereupon, a recess was taken.)

23 JUDGE BAKER: Hearing will now resume after our  
24 recess.

1           Prior to the recess, Mr. Arms was being  
2 examined by Mr. Tosi. Are there any other questions? Do  
3 you have any more questions? Mr. Vetne?

4                           CROSS EXAMINATION

5                           BY MR. VETNE:

6           Q     Mr. Arms, were you present earlier in the  
7 hearing for Bill Fitchett's testimony and Mr. Buelow's  
8 testimony which discussed some difficulty in the Fall of  
9 2001?

10          A     Yes, I was.

11          Q     And you heard their descriptions of their milk  
12 supply arrangements with independent producers and  
13 contracts with cooperatives?

14          A     Yes.

15          Q     Is that fairly typical of the members of the  
16 New York State Dairy Foods, their description of their  
17 supplies as well as their difficulty?

18          A     I can't characterize that. I'm familiar with  
19 some but not all.

20          Q     Okay. The ones that you're familiar with, was  
21 their description fairly typical?

22          A     Perhaps.

23          Q     In what way was it atypical?

24          A     Well, you know, they have some large handlers

1 involved in the membership and they have some smaller  
2 ones, and I believe that in the case of Bill Fitchett, he  
3 characterized his business as being of the smaller size  
4 whereas the Elmhurst operations is considered a major one.

5 Q With the exception of some quantitative  
6 differences, were their experiences typical of the  
7 handlers that you're familiar with?

8 A I'm sorry. I didn't get the question.

9 Q Okay. The question is, with respect -- with --  
10 with the exception of perhaps some quantitative  
11 differences, were their descriptions typical of the  
12 handlers, other handlers that you're familiar with?

13 A Yes.

14 Q Were -- did you help place some milk to meet  
15 the temporary needs in the Fall of 2001?

16 A Yes.

17 Q With respect to the handlers that were so  
18 supplied, what percentage of their monthly needs were met  
19 by supplemental shipments from non-contracted sources?

20 A I can't answer that, as I -- I do not know. I  
21 do not have full knowledge of their placement.

22 Q Do you have enough knowledge to be able to  
23 comment on whether it was a substantial portion of their  
24 monthly needs or tiny portion?

1           A     You're limiting your question to those two  
2 participants?

3           Q     No. To any -- any -- any -- any handler or  
4 distributor that you're familiar with that had trouble in  
5 the Fall of 2001 obtaining milk between his regular supply  
6 of independent or cooperative milk, the portion that they  
7 required for supplemental milk in relation to their  
8 ordinary monthly supply.

9           A     I don't know to what extent that was in terms  
10 of the percentage because I'm not privy to all of their  
11 information.

12          Q     Okay.

13          A     I don't do their market reports or whatever. I  
14 don't know that.

15          Q     You indicated that you helped to place some  
16 milk during that period. To whom did you place milk?

17          A     Proprietary information.

18          Q     The identity of the handler to whom that --  
19 that you helped supply milk is proprietary?

20          A     I believe it is, yes.

21          Q     Is the handler that you helped obtain milk  
22 during that period a member of New York State Dairy Foods  
23 or one of the non-members of the reporting participants?

24          A     Both.

1           Q     At the current time, I think you identified a  
2     principal problem, that there are no diversion limits  
3     either in the Fall or in the Spring, and you propose  
4     diversion limits as do some others, and you propose the  
5     ability of the Market Administrator to adjust diversion  
6     limits.

7                     With respect to supplying milk to alleviate  
8     temporary shortages, would you expect that if there are  
9     limits in diversion, that -- that adjustment of those  
10    limits would be an important source of supplemental milk  
11    during times of supply crisis?

12           A     The main function of the diversion limit, as I  
13    understand the word, is that you limit the total  
14    association with the market to pool milk and over.  If  
15    it's diverted extensively beyond limits, it's going to be  
16    depooled.

17           Q     I understand.  At the current time, the Market  
18    Administrator only has authority to adjust supply plant  
19    shipments, correct, and supply plant shipments --

20           A     Yes.

21           Q     -- represent a relatively small portion of the  
22    total milk pooled?

23           A     As I testified, it's down to three plants.

24           Q     Right.

1           A     Relatively small plants.

2           Q     So, the -- the establishment of a diversion  
3 percentage, whatever it might be, and the ability to  
4 adjust that percentage would be expected to be a major  
5 source of supplemental milk, would it not?

6           A     It could be, yes.

7           Q     It could be?  What -- what --

8           A     That's the reason we're proposing it.

9           Q     Well, you're being equivocal.  Why would you be  
10 equivocal?  You said could be.  Wouldn't you expect that  
11 since the majority of milk is milk to which no diversion  
12 limit applies, wouldn't that be a principal source of  
13 supplemental milk?

14          A     Well, there can be a concern that you could  
15 have distant milk continue to be associated with this  
16 market, and if the diversion limits are too high, then  
17 they can jockey those diversion -- their diversions around  
18 so that they can still keep them outside of the market.

19          Q     I see.  With respect to the milk supply within  
20 the market, the majority of which is milk that is not  
21 subject to any limits applied to supply plants?

22          A     I would agree with that.

23          Q     When -- you would agree with that, and if  
24 diversion limits are reduced, so that more milk has to be

1 shipped to pool plants, that would be an important source  
2 of additional milk, a tool for additional milk for the  
3 market?

4 A Yes, it would be more milk associated with the  
5 pool, one way or another.

6 Q Well, diversion limits associated with the  
7 pool?

8 A If it's shipped within the diversion limits, it  
9 doesn't necessarily mean it's going to be diverted to the  
10 pool distributing plants.

11 Q No. I understand that. In fact, it won't be.  
12 By definition, diversion --

13 A The additional milk available.

14 MR. VETNE: Are there any other questions for  
15 Mr. Arms?

16 (No response)

17 JUDGE BAKER: Let the record reflect that there  
18 are none.

19 Thank you very much.

20 (Whereupon, the witness was excused.)

21 MR. ENGLISH: Your Honor, I move admission of  
22 Exhibits 34, 35, 36, and 37.

23 JUDGE BAKER: Very well. Are there any  
24 questions or objections?

1 (No response)

2 JUDGE BAKER: Hearing none, the documents  
3 marked as Exhibits 34 through 37 are hereby admitted and  
4 received into evidence.

5 (The documents referred to,  
6 having been previously marked  
7 for identification as  
8 Exhibit Numbers 34, 35, 36,  
9 and 37, were received in  
10 evidence.)

11 MR. ENGLISH: Your Honor, I have no further  
12 witnesses.

13 JUDGE BAKER: Very well. Are there --

14 MR. ENGLISH: Well, on Proposals 1 through 4.  
15 Mr. Arms will appear later on Proposal 14.

16 JUDGE BAKER: Very well. Does anyone else have  
17 any witnesses? Yes, Mr. Beshore?

18 MR. BESHORE: Your Honor, we have two -- two  
19 further witnesses, Mr. Gallagher to be recalled and Mr.  
20 Schad to be recalled. Mr. Gallagher has a nine-page  
21 statement which I have available, and I'd like to now mark  
22 as the next proposed Exhibit 38.

23 JUDGE BAKER: 38.

24 MR. BESHORE: I believe.

1           MR. BESHORE: I would like to suggest and  
2 propose that rather than have Mr. Gallagher read the  
3 exhibit, the testimony and the exhibit into the record,  
4 that we distribute it and take a few minutes and allow --  
5 allow everyone to have the opportunity to read it, and  
6 that I request that it be admitted into the record as if  
7 read, as if he had read and given the testimony, and that  
8 we then -- I'll have a couple of additional questions for  
9 him on direct examination and then he may be made  
10 available for cross examination on the full statement as  
11 if presented, plus his supplemental questions.

12           JUDGE BAKER: Are there any objections to that  
13 procedure?

14           (No response)

15           JUDGE BAKER: Let the record reflect that there  
16 are none.

17           MR. ENGLISH: Your Honor, I don't have an  
18 objection. I'd just note that Mr. Arms is literally  
19 upstairs working further on Proposal 14, and this might  
20 perhaps be the time or point where there's an interesting  
21 point there, but why don't we move forward because I'm  
22 sure we have plenty to do?

23           JUDGE BAKER: Very well. You mean Mr. Arms  
24 isn't here?



1 marked for identification as  
2 Exhibit Number 38.)

3 Whereupon,

4 EDWARD GALLAGHER  
5 having been first duly sworn, was called as a witness  
6 herein and was examined and testified as follows:

7 DIRECT TESTIMONY

8 "Proposal 4. Payments from the Producer  
9 Settlement Fund are presently required to be disbursed by  
10 the 16th of the month. Proposal 4 from the Hearing Notice  
11 seeks to change the 16th to the day after the due date  
12 required for payment to the Producer Settlement Fund. The  
13 intent of this proposal is to provide a more orderly  
14 disbursement of funds. Under current provisions, the 16th  
15 of the month sometimes is the same day that payments into  
16 the Producer Settlement Fund are made. Identification of  
17 the 16th of the month was a Federal Order Reform aspect  
18 that slipped by our collective purview of the proposed  
19 changes. If recognition of this aspect had occurred  
20 during the Federal Order Reform review process, the ADCNE  
21 cooperatives would have asked for the change which we are  
22 seeking at this hearing.

23 Proposal 5. ADCNE's request changes to Section  
24 1001.7 to limit the ability of vast quantities of milk not

1 produced near the Northeast and not in any meaningful  
2 amount delivered to distributing plants pooled under the  
3 Northeast Order from being pooled under the Northeast  
4 Order. Known as opportunistic pooling, the liberalness of  
5 Section 1001.7 and its resulting impact on blend prices  
6 under the Northeast Order is an unintended consequence of  
7 Federal Order Reform. ADCNE's requested changes will  
8 limit the potentially abusive pool riding that could occur  
9 on the Northeast Order. This abusive pool riding could  
10 lead to vastly lower blend prices, reduced milk production  
11 within the Northeast, and a longer-term inability for  
12 Class 1 distributing plants from being adequately  
13 supplied.

14           These proposed changes are not meant to  
15 prohibit milk produced in distant production regions from  
16 being pooled under the Northeast Order. Instead, the  
17 changes are meant to limit such pooling to that which has  
18 a regular association with distributing plants pooled  
19 under the Northeast Order. Under the Order's current  
20 provisions, a manufacturing plant in a distant area could  
21 become a pool plant under the Northeast Order in the Fall  
22 months by delivering a small portion of its plant receipts  
23 to an Order 1 distributing plant. It then could remain a  
24 pool plant during the subsequent months of January through

1 July without shipping any milk to a pool distributing  
2 plant. As a pool plant with no pooling requirements, it  
3 could ultimately pool the entire milk production of the  
4 state in which it is located.

5 These are two aspects of Section 1001.7 that  
6 need to be dealt with in order to prevent what has become  
7 known as opportunistic pooling and thereby reinforce the  
8 integrity of the Northeast Federal Order. Both aspects  
9 are mutually inclusive and need to be dealt with swiftly  
10 and simultaneously.

11 The first aspect is the elimination of  
12 Subsection 7 of Section 1001.7. The Order language in  
13 Subsection 7 is more popularly known as the "split-plant"  
14 provision. This provision allows a pool plant to  
15 designate a portion of its plant as a non-pool plant. The  
16 use of the split-plant provision creates two paper  
17 accounting plants out of one physical plant location and  
18 it serves to facilitate opportunistic pooling on the  
19 Northeast Order.

20 The second aspect relates to the Northeast  
21 Order's supply plant shipping provisions. Presently, to  
22 qualify as a pool plant under Section 1001.7(c), a  
23 manufacturing plant is required to transfer or divert at  
24 least 10 percent of its plant receipts to a pool

1 distributing plant during the months of August and  
2 December and transfer or divert at least 20 percent to a  
3 pool distributing plant during the Fall months of  
4 September, October and November. If a manufacturing plant  
5 meets these requirements in each of the months of August  
6 through December, the present Order language allows such a  
7 plant to automatically be a pool plant during the  
8 subsequent January through July, including the entire  
9 flush period. Meeting the August through December pool  
10 plant requirements allows a manufacturing plant to pool  
11 unlimited amounts of milk on the Order Number 1 pool  
12 without having to ship a single load of milk to a pool  
13 distributing plant.

14 Manufacturing plants that have set up their  
15 operations to take in both Grade A and Grade B milk can  
16 best take advantage of the split-plant pooling provision  
17 that ADCNE is attempting to change. Such plants can  
18 utilize this provision to "skinny" down the Grade A plant  
19 receipts to make it easier for them to become a pool plant  
20 under a high Class 1 utilization and ultimately high  
21 producer price differential Order. Here's how.

22 Take, for example, a cheese plant located  
23 outside of the Northeast that takes in 62 million pounds  
24 of milk in a month that can be treated as two plants, a

1 Grade A plant and a Grade B plant. For every one load of  
2 milk transferred from the Grade A plant to a pool  
3 distributing plant under the Northeast Order, the  
4 manufacturing plant can take delivery at the Grade A plant  
5 and pool on the Northeast Order an additional nine loads  
6 during August and December. By doing this, the Grade A  
7 plant meets the requirements of a pool plant for those  
8 months. The remaining milk purchases, amounting to 1,230  
9 loads of milk, are delivered to the same physical facility  
10 but to the cheese plant's Grade B plant side. These  
11 loads, plus the nine loads on the Grade A side that aren't  
12 shipped to a pool distributing plant, are used to  
13 manufacture cheese. Since the milk at the Grade B side of  
14 the plant is Grade A and can be pooled under Federal  
15 Orders, the cooperative operating the plan can use  
16 provisions in the local Federal Order to get the milk  
17 pooled on that local order.

18 During the Fall months of September, October  
19 and November, two of the 10 loads delivered to the Grade A  
20 side would be delivered to a pool distributing plant in  
21 the Northeast Order to qualify the Grade A side of the  
22 plant as a Northeast Order pool supply plant.

23 Once accomplished, each month during August  
24 through December, the Grade A side of the plant

1 automatically becomes a Northeast Order pool supply plant  
2 for the subsequent months of January through July.  
3 However, there is no requirement to ship any milk to a  
4 Northeast Order distributing plant again until August.  
5 Instead, all the milk delivered to the Grade a side can be  
6 utilized in the production of cheese, diverted to the  
7 Grade B side or diverted to another cheese plant nearby.

8 The Northeast Order has an appropriately  
9 liberal one-day touch-base provision. After the  
10 equivalent of one-day's milk production of a farmer is  
11 delivered to a Northeast Order pool plant, that farmer can  
12 become a Northeast Order producer. The farmer maintains  
13 Northeast Order producer status as long as his/her milk is  
14 associated, i.e., pooled, with the Northeast Order pool  
15 each subsequent month and the producer's milk is not  
16 delivered to a non-pool Class 1 plant on any day.

17 Back to our example, the Northeast Order touch-  
18 base provision means that any producer whose milk is on a  
19 load that is delivered to the Grade A side of the plant  
20 meets the qualifications to have his/her milk pooled under  
21 the Northeast Order. During the August to December  
22 qualifying period, the supply plant shipping provisions  
23 limit the amount of milk that can be pooled and limits the  
24 amount of milk that would be delivered to the Grade A

1 side. However, during the free pooling period of January  
2 through July, any farmer delivering just one day to the  
3 Grade A side becomes eligible for Northeast Order pool  
4 producer status.

5 It is here during this period where the real  
6 threat of pool-riding abuse can occur. Now, a single  
7 plant has the theoretical ability to pool 100 percent of  
8 its state's milk production on the Northeast Order pool.  
9 Here is why.

10 In my example of a split-plant purchasing 62  
11 million pounds of milk per month, this equates to two  
12 million pounds of milk receipts per day. Although not  
13 strictly the case, let's assume that the two million  
14 pounds per day represents two-days' milk production on  
15 about 300 farms. By juggling routes, it is theoretically  
16 possible to qualify 9,300 producers, 300 farms times 31  
17 days, on the Northeast order in January. During February,  
18 the same rotation procedure could be used to pool qualify  
19 another 8,400 farms and an additional 784 million pounds  
20 of milk. Since 961 million pounds could have been  
21 qualified in January, a total of 1.7 billion pounds of  
22 milk could be pooled o the Northeast Order during  
23 February. As you can see, it doesn't take too many months  
24 before a state as large as California could have 100

1 percent of its monthly milk production pooled on the  
2 Northeast Order.

3 Recapping this example, the Northeast Order  
4 provisions present the opportunity for a manufacturing  
5 plant of any intake capacity, from two loads per month to  
6 150,000,000+ pounds of milk per month in the heart of a  
7 distant marketing order's milkshed, to deliver a total of  
8 eight loads of milk, about 400,000 pounds of milk, during  
9 August through December and qualify as a pool plant during  
10 the subsequent January through July. Upon achieving this,  
11 the particular plant not only can pool 100 percent of the  
12 milk it uses for manufacturing at the plant, but all the  
13 milk produced in the state in which it is located during  
14 the subsequent January through July.

15 For manufacturing plants located in states  
16 outside of the Northeast Order that purchase milk in the  
17 milkshed of a marketing order with a producer price  
18 differential or blend price that is lower than the  
19 Northeast's, the potential economic harm to the Order  
20 Number 1 pool can be significant and place at risk its  
21 producer price differential level, the economic, financial  
22 and psychological impact on the Order 1 pool producers in  
23 the Northeastern states, and the ability of cooperatives  
24 and handlers to maintain a competitively-priced milk

1 supply that meets the needs of the Class 1 handlers and  
2 dealers.

3 Although not currently to this extreme, the  
4 potential ability for this to occur should be corrected.  
5 Ultimately, taken to an extreme, the ability for  
6 Northeastern Class 1 and manufacturing plants to compete  
7 in regional and national markets could be harmed.

8 Continuation of these provisions, as is, is  
9 unnecessary to the fulfillment of the purpose of the  
10 Northeast Order. At present, the provisions discussed  
11 serve to create the potential disorderly marketing  
12 conditions that could undermine the strong and vibrant  
13 dairy industry in the Northeast.

14 ADCNE strongly recommends the following changes  
15 to reduce potentially harmful effects of opportunistic  
16 pool riding.

17 Eliminate Section 1001.7(c)(3) which allows for  
18 manufacturing plants to obtain free-ride pooling during  
19 January through July if, during each of the prior months  
20 of August through December, the plant met the pool plant  
21 provisions.

22 Amend the provisions of Section 1001.7(c)(1) to  
23 create year-round supply plant pool requirements.  
24 Currently, there are year-round requirements that are

1 imposed on manufacturing plants that do not meet the  
2 August through December qualification requirements.

3 These requirements are that during the months  
4 of January through August and December, a minimum of 10  
5 percent, and during September through November, a minimum  
6 of 20 percent of plant receipts are received or diverted  
7 to Northeast Order pool distributing plants.

8 ADCNE requests that 1001.7(c)(1) be amended to  
9 incorporate the 10 percent shipping requirements of  
10 January through August and December and the 20 percent  
11 shipping requirements of September through November as the  
12 regular monthly year-round shipping requirements for pool  
13 supply plants.

14 Eliminate Section 1001.7(h)(7) which allows for  
15 split plants.

16 Make the requested adjustments in 1001.7(g)  
17 that correspond to our marketwide services proposal.

18 Redesignate Paragraphs 1001.7(c)(4) and (c)(5)  
19 as Paragraphs (c)(3) and (c)(4).

20 Exhibit X, Table 1, estimates the impact to the  
21 producer price differential as a result of milk being  
22 pooled in the manner described above. The pounds  
23 highlighted under the heading "opportunistically pooled"  
24 are estimated from a table in Exhibit 5 presented by Peter

1 Fredericks of the Northeast Order Market Administrator's  
2 office. To get the opportunistically-pooled pounds, I  
3 took Peter's monthly numbers and subtracted three million  
4 pounds. This subtraction was made based on my estimates  
5 of the milk associated with the Northeast Order pool due  
6 to the Order 1 pool distributing plant located in Utah.

7 The analysis I went through shows that for the  
8 18-month period from January 2001 through July 2002, the  
9 Northeast Order producer price differential was reduced by  
10 an estimated 16 cents per hundredweight. This varied from  
11 a high of 51 cent reduction to an increase of about 1 cent  
12 on a monthly basis.

13 The changes ADCNE is recommending will likely  
14 restore most of this value to the producer price  
15 differential and improve prices to all Northeast Order  
16 producers. Although the amount of the reduction on the  
17 Northeast Order producer price differential is not as  
18 great as occurred in other Orders due to pool-riding  
19 activities, it nonetheless is an unnecessary cost to the  
20 pool. More importantly, the potential extent of the harm  
21 to the pool could so severely lower the Northeast's  
22 producer price differential that these changes must be  
23 made on an expedited basis and be implemented prior to  
24 January 1, 2003.

1           During the Federal Order Reform process, ADCNE  
2 was a proponent of the free-ride provisions for the  
3 subsequent January through July but did not request the  
4 split-pool plant provision. During the Federal Order  
5 Reform comment period, ADCNE did not recognize the  
6 significance of the split-plant provisions in combination  
7 with the free-ride provisions could have on the Northeast  
8 Order producer price differential. This hearing is the  
9 first opportunity we have had to correct this unintended  
10 consequence of Federal Order Reform. Due to the need to  
11 correct this issue prior to the beginning of the next  
12 free-ride period that begins in January, ADCNE requests an  
13 emergency and expedited implementation of this proposal by  
14 January 1, 2003.

15           During the ADCNE deliberations of the formation  
16 of the Northeast Order, Dairylea and DFA had been  
17 proponents for allowing the free-ride provision. It was  
18 our goal to create a set of Federal Order provisions that  
19 were fair to all handlers previously pooled under the  
20 former Orders that were to make up the Northeast Order.  
21 Dairylea and DFA recognized that it would be important to  
22 have the free-ride provisions so that Friendship Dairies,  
23 Pollio, Kraft, Chateaugay Cooperative and Dietrichs Milk  
24 Products would all be able to maintain their direct

1 producer shippers and to pool milk during the early  
2 implementation of the new Order.

3           Since implementation of Federal Order Reform,  
4 one of these businesses chose to make their producers non-  
5 pool. Presently, all of the direct shippers to each of  
6 these businesses are pooled by Dairy Marketing Services.  
7 Due to the changing business relationships in the  
8 Northeast Order and the continuation of provisions that  
9 allow proprietary plants to pool their independent  
10 shippers if they so choose, the Northeast Order's free-  
11 ride provisions serve no useful purpose and should be  
12 eliminated. Also note, any handler currently meeting the  
13 20 percent shipping requirements in September through  
14 November would not be disadvantaged by the imposition of  
15 year-round shipping requirements since the January through  
16 July percentages would be lower than those they would be  
17 meeting in the Fall.

18           My ADCNE colleagues and I have reviewed New  
19 York State Dairy Food's Proposal Number 2. ADCNE supports  
20 the parts of this proposal to the extent that it is  
21 similar to ours regarding split plants and shipping  
22 provisions. However, their proposed increase in the  
23 August through December shipping provisions is unwarranted  
24 and could lead to disorderly marketing conditions in that

1 some handlers currently pooling milk on the Northeast  
2 Order could be forced to depool producers.

3 Additionally, the NYS Dairy Foods proposal has  
4 not closed the loophole in the Order regarding the free-  
5 ride shipping provisions during January through July.  
6 Their proposed changes do not present the appropriate  
7 safeguards to the integrity of the Order. Although a  
8 portion of their Proposal Number 3 would require 25  
9 percent of receipts to be shipped to pool plants during  
10 January through July, this does not ensure that Class 1  
11 distributors receive milk nor does it limit the potential  
12 pool-riding ability for a distant region's manufacturing  
13 plant. These things being the case, Proposal 2 should be  
14 rejected.

15 Friendship Dairies Proposal Number 10 has also  
16 been reviewed by ADCNE. Again, ADCNE supports it in that  
17 it maintains shipping provisions during August through  
18 December. However, it does not address the free-ride  
19 months of January through July and its reduction in the  
20 level of the shipping provisions would not be an  
21 improvement to the Northeast Order. As a point of note,  
22 we believe the reference to the Paragraph (f) in the  
23 1001.7(c)(3) is incorrect. We believe the correct  
24 reference should be Paragraph (g), not Paragraph (f).

1           Proposal 6. The changes to 1001.13(d)(1) were  
2 requested so that the Order language is clearer relative  
3 to the interpretation of this provision. Presently, the  
4 touch base for a producer is one day. Once a producer's  
5 milk is delivered to a pool plant during the month, at any  
6 time during the month, the producer's milk is eligible to  
7 be pooled for the entire month and any subsequent month,  
8 provided the producer remains a pool producer under the  
9 Northeast Order. If such producer does not have any of  
10 his/her milk pooled under the Northeast Order in a  
11 subsequent month, such farm must re-establish itself with  
12 the Northeast Order by having his or her milk delivered to  
13 a pool plant some time during a month.

14           The Northeast Order does not have any year-  
15 round diversion limitations for pool distributing plants.  
16 Although there aren't specific diversion limitations for  
17 pool supply plants, the monthly shipping requirements, if  
18 any, have been de facto diversion limitations. That is,  
19 if a plant or 9-C cooperative has to divert 10 percent of  
20 its receipts to a pool distributing plant, it then becomes  
21 limited to diverting no more than 90 percent of its  
22 receipts to a non-pool plant. We believe these also apply  
23 to pool distributing plants.

24           The lack of specific diversion limitations on a

1 year-round basis under the producer milk provisions needs  
2 to be corrected. The lack of diversion limitations on  
3 distributing plants means they can divert significant  
4 amounts of milk off their plant during January through  
5 July, limited only by economics and the amount of milk  
6 that can be delivered to their plant. Ultimately, this  
7 could mean that one pool distributing plant could pool an  
8 entire region's milk production. Here's an example of how  
9 it could happen.

10           Suppose a pool distributing plant needs 37  
11 million pounds of milk. It receives this milk from 200  
12 farms that produce 3,000 pounds every day. Since there  
13 are no de facto diversion limitations at pool distributing  
14 plans during January through July, each day, 200 different  
15 farms could supply milk to the plant. Since one day's  
16 farm production was received at the pool plant, the  
17 producer is qualified for the Order Number 1 pool until  
18 such farm's milk is no longer reported as October Number 1  
19 pool milk. So, in January, this plant could qualify 577  
20 million pounds of milk. In February, the distributing  
21 plant could qualify an additional 521 million pounds for  
22 the Order Number 1 pool and allow that plant to pool 1.1  
23 billion pounds. In a few months, the plant could  
24 theoretically pool all the milk in the Northeast on Order

1 Number 1.

2           Although I don't illustrate them here, there is  
3 a potential pool-riding opportunity for milk produced  
4 outside of the region and taking advantage of the lack of  
5 diversion limitations at pool distributing plants. ADCNE  
6 requests swift and immediate resolution to this issue by  
7 implementing our proposal on an emergency and expedited  
8 basis.

9           During the Federal Order Reform process, myself  
10 and other members of ADCNE failed to recognize this  
11 loophole in the Northeast Order. If we had, we would have  
12 pointed this out to Dairy Division and requested the  
13 diversion limitations that we requesting at this hearing.

14           The application of our request is fairly  
15 straightforward. ADCNE requests year-round monthly  
16 diversion limitations that would be one minus that month's  
17 shipping provision. This then would be diversion  
18 limitations of 90 percent during December through August  
19 and 80 percent for September through November. Additional  
20 language is suggested that milk that is over-diverted  
21 shall not be producer milk and that the Market  
22 Administrator shall depool all non-pool plant deliveries  
23 if the over-diverting handler doesn't cooperate with the  
24 Market Administrator by designating producers whose milk

1 will be depooled.

2 ADCNE requests that any milk depooled due to  
3 over-diversion is not treated under the dairy farmer for  
4 other market provisions and is allowed to be pooled again  
5 the following month and will not carry the dairy farmer  
6 for other market penalties.

7 Also, ADCNE is requesting that the Market  
8 Administrator be given the same authority he presently has  
9 with supply plant shipping provisions and that other  
10 Market Administrators have in their Orders with diversion  
11 limitations percentages; namely, to be able to  
12 administratively adjust the percentages as market  
13 conditions warrant. Truly, this is an amendment that is  
14 more procedural than strategic. It is the intent of ADCNE  
15 to maintain the diversion percentages at one minus the  
16 shipping provision percentages. If the shipping  
17 percentages are adjusted administratively, then the  
18 diversion percentages also need to be so adjusted.

19 ADCNE also recognizes the unfairness of  
20 allowing the same milk to be pooled on a state order,  
21 utilizing minimum pricing and marketwide pooling of the  
22 Class 1 price proceeds, and a Federal Order. To my  
23 knowledge, such double dip pooling is not now occurring on  
24 the Northeast Order. However, due to the presence of the

1 Western New York State Milk Marketing Order within the  
2 milkshed of the Northeast Order and the knowledge of  
3 double dip pooling of California milk elsewhere, the  
4 Northeast Order should be amended to prevent this from  
5 occurring.

6 The addition of Paragraph 1001.13(e) was  
7 specifically worded to make the double dipping prohibition  
8 effective on state order milk that utilizes minimum class  
9 pricing and marketwide pooling of the class price  
10 proceeds. This would certainly entail milk pooled under  
11 the Western New York State Order and California's state  
12 order. However, it would have no impact on milk priced  
13 under state pricing programs such as those operated by the  
14 Pennsylvania Milk Marketing Board, the Maine Milk  
15 Commission, the former Northeast Dairy Compact or the  
16 Virginia Milk Commission. Under these state pricing  
17 programs, state-mandated Class 1 premiums are paid to  
18 producers delivering milk to Class 1 plants under their  
19 regulation. In the case of Virginia Milk Commission,  
20 Maine, the Dairy Compact and possibly under the PMMB,  
21 these Class 1 premiums are pooled and paid to a wider  
22 group of farms than those actually delivering to the Class  
23 1 plants. Allowing milk that is priced under state milk  
24 pricing regulations like those mentioned would maintain

1 orderly marketing conditions within the Northeast Order.  
2 Using this proposed amendment to depool milk priced under  
3 the four Northeastern state programs would cause serious  
4 disorderly marketing conditions as it would impinge on the  
5 ability for Northeast Order pool distributing plants from  
6 maintaining an adequate supply of milk for their needs.

7 Additionally, ADCNE requests that the present  
8 1001.13(d)(2) be redesignated as 1001.13(d)(3).

9 My ADCNE colleagues and I have reviewed New  
10 York State Dairy Foods Proposal Number 3. To the extent  
11 that it is similar to our Proposal Number 6, in that it  
12 maintains a touch-base provision, would implement  
13 diversion limitations and give the Market Administrator  
14 discretionary authority to adjust the diversion limits,  
15 ADCNE supports it. However, ADCNE does not support their  
16 two-day touch-base provision, request to have milk touch  
17 base in August through December, and restrictive levels of  
18 their diversion limitations.

19 Implementation of Proposal 3 could cause  
20 disorderly markets as it would significantly raise the  
21 cost of producers maintaining their pool eligibility. It  
22 could prevent some producers located in the Northeastern  
23 states and who have been regularly pooled on the  
24 Northeastern Order or its predecessor Orders from

1 retaining pool producer status. If milk was forced from  
2 the pool, it could undermine premium markets and blend  
3 prices throughout the Northeast."

4 (Whereupon, a recess was taken.)

5 JUDGE BAKER: Back on the record.

6 MR. ENGLISH: Mr. Beshore may have some  
7 questions first, I think.

8 MR. BESHORE: Yes, I do have just a few  
9 questions on direct.

10

11

12

DIRECT EXAMINATION

13

BY MR. BESHORE:

14

Q Mr. Gallagher, first, on Page 4 of your  
15 testimony, which is Exhibit 38, at the bottom, there's a  
16 reference to Exhibit X, Table 1. Should that be Exhibit  
17 38, Table 1?

18

A Yes, it should be.

19

Q That's the table attached to your testimony  
20 which is in Exhibit 38?

21

A Yeah. The last page of the testimony.

22

Q Now, your testimony in Exhibit 38 does not  
23 address Proposal 1. Does ADCNE have a position with  
24 respect to Proposal 1?

1           A     Yes, it does.

2           Q     Okay.  Would you indicate that position and  
3 explain it, please?

4           A     Yeah.  ADCNE opposes Proposal 1.  Dairy farming  
5 is an industry that's 24/7.  Those that provide services  
6 to dairy farmers unfortunately sometimes have to work some  
7 pretty odd and pretty hard hours and sometimes that means  
8 working late to get the required things done so that dairy  
9 farmers can get paid.

10                     We are all challenged in our businesses to be  
11 able to meet deadlines.  There is no single business in  
12 this room that isn't challenged in that manner, and  
13 regarding the -- the reporting issues, certainly any --  
14 any handler in this room that has to rely on data coming  
15 in from another business entity is -- is challenged on  
16 getting the information in time so that they can file the  
17 reports timely, and certainly anybody that relies on  
18 information from another business does not necessarily  
19 have any ability to force another business to report to  
20 them earlier.  So, we are all challenged with that.

21                     That said, I do not believe -- ADCNE does not  
22 believe that the current filing date is unreasonable, and  
23 we all, I think, as an industry need to work harder  
24 together to find ways for the industry to come together to

1 resolve this problem as opposed to making a regulatory  
2 change that in the end will result in delay of payment to  
3 those who we serve and that is dairy farmers.

4 This is the, as I had testified earlier, the  
5 largest Federal Milk Marketing Order in the United States,  
6 largest number of producers, largest number of non-member  
7 producers, and -- not the largest number of producers but  
8 certainly the largest -- one of the largest number of  
9 producers and the largest number of non-member producers,  
10 and we do not want to see payments to dairy farmers  
11 delayed any further than they already are, and I think as  
12 an industry, we can come together to resolve these issues  
13 ourselves.

14 I would also like to point out that the  
15 Northeast Order is already the latest reporting date  
16 order. There's a couple of others whose reports of  
17 utilization are also due by the 9th, but none as late as  
18 the 10th. I also don't believe that by adjusting the date  
19 it would speed up the process. I just think everything  
20 would happen one day later.

21 So, in summary, in excuse of the administrative  
22 difficulty, I believe it will cause huge financial -- huge  
23 financial costs to dairy farmers pooled under this Order,  
24 and I believe that Federal Order Reform, when the

1 Secretary judged that there would be some challenges  
2 because of the make-up of our Order, he did in fact set a  
3 date for the Northeast Order that was the latest of any of  
4 the other Orders or -- or as late as any other Order.

5 So, I believe during the Federal Order Reform  
6 process, the unique characteristics of the Northeast Order  
7 were considered when the Secretary set the current  
8 reporting date.

9 Q One of the changes that would be made in  
10 Proposal 1 does not relate to reporting challenges, it's  
11 strictly the request to defer the partial payment now due  
12 on the 26th of the month till the 30th of the month.

13 Is your opposition to Proposal 1, does it  
14 include opposition to deferring the partial pay date?

15 A Yes, it is. Dairy farmers should be paid as  
16 timely as possible. The money we're talking about is  
17 dairy farmer money, and it should be paid to them as  
18 quickly as possible. I recall Mr. Fitchett's testimony of  
19 yesterday indicating that the number of advances he has to  
20 make because of the closeness of the two payment dates and  
21 with 45, I can tell you two businesses that I work with,  
22 that's a pretty small number, and advances to dairy  
23 farmers are a normal course of business in our industry as  
24 well as our pool adjustments that we referred to. That's

1 the normal course of the business, that all of us operate  
2 under.

3 Q Now, Mr. Gallagher, you've addressed both in  
4 your comments in Exhibit 38 and previously some comments  
5 with respect to whether you believe the issues in this  
6 hearing should be addressed by the Secretary on an  
7 emergency or an expedited basis.

8 Can you just summarize ADCNE's position with  
9 respect to whether conditions exist in Order 1 which merit  
10 consideration of proposals on an expedited basis?

11 A Yes, I can. Thank you.

12 The ADCNE proposals here at this hearing, I  
13 believe, all warrant to be considered on an emergency and  
14 expedited basis. In Exhibit 38, we talk about some  
15 solutions to what we call "pool-riding" issues, both due  
16 to split-plant provisions in this Order that I feel are no  
17 longer necessary, that the group feels are no longer  
18 necessary, as well as having the -- the zero percentage  
19 shipping percentage during January through July as well as  
20 not having diversion limits on pool distributing plants.

21 They all create a loophole in the Order that  
22 can be taken advantage of and that will lower blend prices  
23 to producers in this area. I believe that needs to be  
24 dealt with on an emergency basis to close up those

1       loopholes as well because if -- if new information comes  
2       along that we may see this in the August pool or anything  
3       like that that may change our minds on this, we'd reply in  
4       brief, if there was a change to our position on -- on the  
5       emergency conditions that exist that I've talked about or  
6       that we've written about in Exhibit 38.

7               As well as for marketwide services, our  
8       marketwide services proposal, the ADCNE cooperatives and  
9       owners that meet the balancing provisions, the marketwide  
10      service provisions, have experienced significant balancing  
11      costs that are becoming burdensome to their members in  
12      that they have to finance that entire electricity --  
13      excuse me -- milk balancing curve. We -- we cannot go  
14      through another flush period without some assistance and  
15      some mitigation from those costs.

16             So, we're asking that our Proposal 7 be dealt  
17      with on an emergency and expedited basis. We believe that  
18      Congress stated that these types of provisions are very  
19      important and should be timely acted on, and we will talk  
20      in our brief on how we believe that should be applied.

21             Q     Thank you, Mr. Gallagher.

22             MR. BESHORE: That concludes my direct  
23      examination and Mr. Gallagher's direct testimony at this  
24      time.

1 JUDGE BAKER: Are there any questions for Mr.  
2 Gallagher? Mr. Vetne?

3 MR. VETNE: Your Honor, I have a request to  
4 briefly interrupt Mr. Gallagher's cross examination with  
5 just a tad additional information by Mr. Fredericks that I  
6 requested that are relevant to several of the pooling  
7 proposals. It's a one-page exhibit.

8 JUDGE BAKER: Well, he's being very gentlemanly  
9 and graciously stepping down.

10 MR. BESHORE: We have no objection to Mr.  
11 Fredericks being called for this -- for this purpose at  
12 this time.

13 JUDGE BAKER: Very well.

14 (Whereupon, the witness was excused.)

15 Whereupon,

16 PETER FREDERICKS

17 having been previously duly sworn, was recalled as a  
18 witness herein and was examined and testified further as  
19 follows:

20 DIRECT EXAMINATION

21 BY MR. VETNE:

22 Q Mr. Fredericks, I asked you this morning, and  
23 I'm extraordinarily grateful that you're here this  
24 afternoon, if you could assemble some information showing

1 the pounds of milk received at manufacturing plants that  
2 are now non-pool plants that were formerly pool plants  
3 under Order 2, is that correct?

4 A That is correct.

5 Q Okay. And you've assembled in a one-page --

6 MR. VETNE: Your Honor, could I have this  
7 marked as the next consecutive exhibit?

8 JUDGE BAKER: It would be Exhibit 39.

9

10 (The document referred to was  
11 marked for identification as  
12 Exhibit Number 39.)

13 JUDGE BAKER: Is that 1997 or 1999?

14 THE WITNESS: 1999, December 1999.

15 JUDGE BAKER: Thank you.

16 It's marked as 39, Mr. Vetne.

17 MR. VETNE: Okay. And there's been a  
18 correction on the -- on the year.

19 BY MR. VETNE:

20 Q Could you just explain what's in here?

21 A This list is pool plants that were classified  
22 as manufacturing plants under the Formal Order, Federal  
23 Order Number 2, in the month of December 1999. A list of  
24 those plants is -- is given in there. These plants now

1 are non-pool manufacturing plants under the new Northeast  
2 Combined Order, and there's two representative months,  
3 July of 2002 and December of 2001, in pounds of milk  
4 received at those plants under the -- under those current  
5 months in the Northeast Order.

6 Q And that's Order 1 of pool milk receipts?

7 A Order 1 pool milk receipts, correct.

8 Q Thank you very much.

9 MR. VETNE: That's all I have.

10 JUDGE BAKER: Very well.

11 MR. VETNE: I move Exhibit 39 into evidence.

12 JUDGE BAKER: Very well. Mr. English?

13 MR. ENGLISH: May I ask a few questions?

14 JUDGE BAKER: Yes.

15 CROSS EXAMINATION

16 BY MR. ENGLISH:

17 Q Mr. Fredericks, would it be correct to say that  
18 the number listed here for pounds of milk received, do you  
19 know whether that is pool milk or non-pool milk?

20 A It is pool milk.

21 Q So, even though the plants may not be pool  
22 plants, this milk is pool milk, correct?

23 A That is correct.

24 Q Could there be other pounds of milk received at

1 these plants that are non-pool milk since they're non-pool  
2 plants?

3 A There could be.

4 Q And you don't have that information because if  
5 it's non-pool milk, it's not reported to you?

6 A That is right. It would not be represented in  
7 these numbers as well.

8 MR. ENGLISH: With those caveats, Your Honor, I  
9 have an objection to its admission.

10 JUDGE BAKER: Very well. Are there any other  
11 questions or objections? Mr. Stevens?

12 MR. STEVENS: Yeah.

13 CROSS EXAMINATION

14 BY MR. STEVENS:

15 Q This is not presented for or against any  
16 proposal, is it?

17 A No, it is not.

18 Q For the use of the parties in the hearing?

19 A That's correct.

20 MR. STEVENS: That's all I have.

21 JUDGE BAKER: Are there any other questions or  
22 objections?

23 (No response)

24 JUDGE BAKER: Hearing none, Exhibit 39 is

1 admitted and received into evidence.

2 (The document referred to,  
3 having been previously marked  
4 for identification as  
5 Exhibit Number 39, was  
6 received in evidence.)

7 JUDGE BAKER: Thank you, Mr. Fredericks.

8 (Whereupon, the witness was excused.)

9 JUDGE BAKER: Thank you, Mr. Gallagher.

10 Whereupon,

11 EDWARD GALLAGHER

12 having been previously duly sworn, was recalled as a  
13 witness herein and was examined and testified further as  
14 follows:

15 MR. VETNE: Thank you, everybody.

16 JUDGE BAKER: Mr. English?

17 CROSS EXAMINATION

18 BY MR. ENGLISH:

19 Q Mr. Gallagher, as to Proposal Number 1, I'm  
20 grateful that you think people should, you know, work  
21 overtime and everything. Would you confirm for me that  
22 your organization was one of the organizations that  
23 produced one or more handlers that represent the New York  
24 State Dairy Foods Association that you were unable to get

1 the reports to them by Tuesday, the 10th of this month?

2 A We weren't this month. We may have been the  
3 other months. I don't believe we were this month.

4 Q So, if I have a witness here who gets on the  
5 stand later and says that, yes, that's when he got his  
6 report, it was Tuesday, the 10th, you would be  
7 contradicting him?

8 A Oh, the individual handler or the Market  
9 Administrator?

10 Q No, no. The individual handler.

11 A Oh, I -- I don't know.

12 Q And so, you don't know when the handler gets  
13 the reports that they're supposed to work overtime and  
14 somehow get them in on time, even though you get to them  
15 late?

16 A I don't.

17 Q Okay. Turn to Table 1 of Exhibit 38. We spent  
18 a little time looking at it, and I thought I just helped,  
19 at least for myself, explain where it came from.

20 A Do you want me to explain how I calculated it?

21 Q Well, let me ask some specific questions, and  
22 then if I haven't covered everything, you can --

23 A Okay.

24 Q -- explain further. The -- the column that is

1 labeled "Paper Pool Pounds", --

2 A Yes.

3 Q -- I looked at Exhibit 5 and while the number  
4 is similar, it is different by about three million pounds  
5 for the page on which the Market Administrator's quoted  
6 the pounds that were coming from states outside the  
7 Marketing Order.

8 A Yep. How I calculated that column?

9 Q Well, first, let me just see if I can -- first,  
10 I'd like to confirm that -- that -- that the real genesis  
11 of that column is milk from outside the Northeastern  
12 states, correct?

13 A Correct.

14 Q So, your definition of paper pool pounds does  
15 not include pounds of milk produced in the Northeast,  
16 correct?

17 A Correct.

18 Q Okay.

19 A Let me back up. There's probably some Rhode  
20 Island milk in there maybe.

21 Q For whatever milk has to be masked because of  
22 that milk, producers or whoever it is, they have to mask  
23 it to handlers, whatever it is, may have gotten thrown  
24 into that column. So, there may be a little bit --

1           A     Nothing significant.

2           Q     But you didn't necessarily mean to include that  
3 because for your term "paper pool pounds", you mean milk  
4 produced outside the Northeast as your testimony  
5 indicates?

6           A     Correct.

7           Q     Okay. Now, --

8           A     And outside of West Virginia.

9           Q     And outside of West Virginia. Now, I did  
10 notice that the sort of general difference of three  
11 million pounds, and I guess -- let me see if I understand  
12 and you tell me if I'm wrong. Would that be pounds  
13 associated with the fully-regulated plant in Utah that is  
14 the Dannon Yogurt facility?

15          A     Again, it was a -- when that plant initially  
16 came on, it looked like there was about three million  
17 pounds showing up in that column in the Market  
18 Administrator statistics. So, I sort of went three  
19 million pounds. I don't know if that's the correct number  
20 or not, and it probably isn't, and so what I'm calling  
21 paper pool pounds is probably -- can be seen as I'm saying  
22 probably not the correct number of pounds. It's probably  
23 too many. So, whatever I calculate here for the net  
24 pooling pack is the worse case scenario. It probably in

1 reality wasn't as negative as what I was showing.

2 Q Okay. Not unlike other proceedings, you were  
3 trying to show an estimate -- you were really trying to  
4 show an illustrative impact as opposed to an exact impact?

5 A Correct. I have no idea what the --

6 Q Fine.

7 A I don't have the information to calculate the  
8 exact number.

9 Q I don't think any of us have, and I appreciate  
10 what you intended to do.

11 So, by way of example, since the milk in  
12 January of 2001 far exceeded the number of pounds of milk  
13 that were pooled for each of the months preceding August  
14 to December, you assumed then that in order to be pooled,  
15 that milk would have to have 10 percent deliveries on the  
16 market to meet the requirements for milk that had not met  
17 the requirements for the previous five months, correct?

18 A Correct.

19 Q And so, that's where again trying to create a  
20 conceptual impact, you came up with deliveries in -- in  
21 the third column?

22 A Yes.

23 Q Then you -- the fourth column would be the  
24 difference between the -- the first column and the third

1 column. I guess you subtract the third column from the  
2 first column?

3 A The additional deliveries?

4 Q Yes.

5 A Yes.

6 Q How did you calculate the Class 3 and Class 4  
7 pounds?

8 A Okay. What -- what -- the assumption I made  
9 was any milk that would have been driven in here on the  
10 truck from an outside area landed in a Class 1 plant, and  
11 milk that normally would have gone to that Class 1 plant  
12 that particular month actually had to be brought to a  
13 manufacturing plant. I made the assumption that it got  
14 diverted to a Class 4 plant, and I will say that I do know  
15 that some milk came in in that manner during this time  
16 period that went to Class 1 plants and did not displace  
17 other milk because the milk was needed at the Class 1  
18 plants, and I do not know if, you know, in that rotation,  
19 whether there's actually milk displaced at Class 1 prices  
20 or went to Class 4. That was the assumption I made. It  
21 could have gone to a Class 3. This is a real ball park  
22 estimate.

23 Q Right. But for the most part, for most of  
24 these months, I mean, it's all -- I haven't checked yet,

1 but for the most part, the -- if it went to Class 4, it  
2 had a lesser impact on the pool than if it went to Class 3  
3 because Class 4 was higher than Class 3 for most of these  
4 months?

5 A It might have. Yeah.

6 Q And then, the -- that column for Class 3 is the  
7 difference, I take it, between additional deliveries and  
8 that amount that you assume went to Class 4?

9 A Yep. Wait, wait. The -- the Class 3 column in  
10 that case was the additional deliveries.

11 Q I'm sorry.

12 A And the distributing plant delivery then  
13 transferred over to Class 4.

14 Q Okay. I see. And you made the assumption that  
15 -- that the additional deliveries went into Class 3 on --  
16 on the grounds that it --

17 A It stayed -- it stayed home and went into a  
18 local manufacturing plant, and then again, I don't know if  
19 it was a Class 3 plant. I am making that assumption.

20 Q But that was -- you made that assumption based  
21 upon the number of hearings on this, and the assumption is  
22 that would be the great economic benefit to the MP that  
23 would have been doing this, correct?

24 A I don't know that. That was the assumption I

1 made, and it wasn't just one entity.

2 Q Well, if it was just one entity, you wouldn't  
3 have had the information. So.

4 Thank you, sir.

5 JUDGE BAKER: Are there other questions for Mr.  
6 Gallagher?

7 (No response)

8 JUDGE BAKER: Let the record reflect there are  
9 none.

10 Thank you, Mr. Gallagher.

11 THE WITNESS: You're very welcome. Thank you.  
12 (Whereupon, the witness was excused.)

13 JUDGE BAKER: Do you wish to admit Exhibit 38  
14 into evidence?

15 MR. BESHORE: Yes, I'd move the admission of  
16 Exhibit 38.

17 JUDGE BAKER: Are there any questions or  
18 objections to Exhibit 38?

19 (No response)

20 JUDGE BAKER: Hearing none, Exhibit 38 is  
21 admitted and received into evidence.

22 (The document referred to,  
23 having been previously marked  
24 for identification as

1 Exhibit Number 38, was  
2 received in evidence.)

3 MR. BESHORE: At this time, I'd like to recall  
4 Dennis Schad.

5 JUDGE BAKER: Very well. Mr. Schad?  
6 Whereupon,

7 DENNIS SCHAD  
8 having been first duly sworn, was called as a witness  
9 herein and was examined and testified as follows:

10 MR. BESHORE: Your Honor, I'd like to ask that  
11 Mr. Schad's testimony be marked as Exhibit 40.

12 JUDGE BAKER: It shall be so marked.

13 MR. BESHORE: It's testimony with respect to  
14 Proposals 8, 9 and 11, and it's not a long statement, and  
15 I would like to ask Mr. Schad to read it now, please.

16 JUDGE BAKER: Very well.

17 (The document referred to was  
18 marked for identification as  
19 Exhibit Number 40.)

20 DIRECT TESTIMONY

21 THE WITNESS: ADCNE opposes Proposal Number 8.  
22 Proposal Number 8, submitted b Friendship Dairies, would  
23 liberalize the pool supply plant qualification procedures.  
24 Currently, a pool supply plant must transfer or deliver

1 directly (divert) to 7-A or 7-B plants sufficient volumes  
2 of milk to qualify. Qualification is determined by a  
3 relationship where distributing plant deliveries  
4 (numerator) are compared to total deliveries to the supply  
5 plant, plus the diversions of the handler operating the  
6 supply plant (denominator). Proposal Number 8 would limit  
7 the deliveries in the denominator to only pooled Order 1  
8 milk controlled by the operator and included on his  
9 handler report. The proposal would specifically exclude  
10 from the denominator milk from the producer handlers, milk  
11 pooled on another Federal Order, non-pool milk and milk  
12 received at the supply plant as Order 1 co-op diverted  
13 milk, 9-C.

14           The intent of the supply plant qualification  
15 procedure is to qualify both the plant and the handler  
16 operator of the plant. It is meaningless to qualify a  
17 supply plant in which the operator does not control the  
18 milk of a group of dairy farmers. A cheese plant operator  
19 would never incur the costs to ship milk from the plant to  
20 a distributing plant unless the plant intended to pool a  
21 group of dairy farmers and draw from the Federal Order  
22 pool.

23           Thus, it is appropriate for the operator of the  
24 plant who also controls the milk of a group of dairy

1 farmers to qualify both the plant and the supply of the  
2 milk he controls.

3 Proposal 8 would effectively reduce the supply  
4 plant qualification standards from their existing modest  
5 levels in this 45 percent Class 1 utilization market.  
6 ADCNE does not believe that reduction in the performance  
7 requirements in Order 1 are appropriate.

8 ADCNE opposes Proposal Number 9. Proposal  
9 Number 9, submitted by Friendship Dairies, would  
10 liberalize the pool supply plant qualifications.  
11 Currently, a pool supply plant must transfer or deliver  
12 directly (divert) to 7-A or 7-B plants sufficient volumes  
13 of milk to qualify. Qualification is determined by a  
14 relationship where the distributing plant deliveries  
15 (numerator) are compared to total deliveries to the supply  
16 plant, plus the diversions of the handler operating the  
17 supply plant (denominator). Proposal Number 9 would add  
18 to the numerator route distribution and packaged fluid  
19 milk transfers from the supply plant.

20 Order 1 has a provision to qualify a  
21 distributing plant, the 7-A provision. That provision  
22 qualifies a distributing plant based on a Class 1  
23 percentage of 25 percent and in-area route distribution of  
24 the Class 1 of 25 percent. The proposal would cause

1 unnecessary confusion to handlers by merging the  
2 characteristics of the 7-A and 7-C provisions together.

3           Additionally, the proposal would have the  
4 possible unintended consequence of pooling on the Order  
5 partially regulated distributing plants with route  
6 distribution, 1001.3, greater than the 7-C plant-shipping  
7 requirement of 10 or 20 percent. Moreover, while the 7-A  
8 definition only includes in-area route distribution, the  
9 proposal does not specify that the route distribution be  
10 within the Marketing Area.

11           ADCNE opposes Proposal Number 9 which combines  
12 the characteristics of two different order provisions for  
13 the benefit of the few supply plants that may have Class 1  
14 sales. The proposal confuses the provisions, such that a  
15 distributing plant could qualify as a supply plant.  
16 During the Reform process, ADCNE advocated the expansion  
17 of federal regulation into the unregulated portions of the  
18 Northeast and a lower in-area route disposition standard  
19 for 7-A plants. The Final Rule included neither. If the  
20 proposal's intention is to accomplish the goal of  
21 extending regulation, ADCNE rejects the method and opposes  
22 Proposal Number 9.

23           I don't believe -- since Number 11 has been  
24 withdrawn, I think probably in the interest of time, it

1 can just be read into -- put in the record as if read.

2 JUDGE BAKER: Very well.

3 "ADCNE Opposes Proposal Number 11. Proposal  
4 Number 11, submitted by Friendship Dairy, would change the  
5 "producer for other markets" provisions of the Producer  
6 section. Currently, a dairy farmer who is caused to be  
7 reported as non-pool by his handler is excluded from the  
8 pool for a specified period. Proposal Number 11 would  
9 change the effective dates of (b)(5) from December to June  
10 to January through July and in (b)(6) from July to  
11 November to August through December. On that portion of  
12 the proposal, ADCNE sees no compelling reason to change  
13 the dates but is open to other reasoning.

14 Our opposition to Proposal Number 11 comes from  
15 its abandonment of the provision in (b)(5) where a dairy  
16 farmer is excluded for the month he is depooled and for  
17 the two succeeding months. Proposal Number 11 would take  
18 away any penalty for depooling a producer during the  
19 current December through June period.

20 ADCNE proposed the "dairy farmer for other  
21 markets" provisions during the Order Reform process.  
22 Order 1 is surrounded by large areas of geography that is  
23 not regulated by any Federal Order. This federally-  
24 unregulated Marketing Area has allowed distributing plants

1 in New York, Pennsylvania, Maryland, and Virginia to be  
2 partially regulated by the Federal Orders. The "dairy  
3 farmer for other markets" provision was advocated to  
4 provide a disincentive to handlers to use Order 1 to  
5 balance these partially-regulated plants.

6 ADCNE opposes the portion in the proposal that  
7 eliminates the two-month penalty for depooling milk during  
8 the first half of the year."

9 MR. BESHORE: With that, I'd like to move the -  
10 - the admission of Exhibit 40, including the third page  
11 which addresses Proposal 11, which is published in here.

12 JUDGE BAKER: Very well. Are there any  
13 questions or objections?

14 (No response)

15 JUDGE BAKER: Hearing none, Exhibit 40 is  
16 admitted and received into evidence.

17 (The document referred to,  
18 having been previously marked  
19 for identification as  
20 Exhibit Number 40, was  
21 received in evidence.)

22 DIRECT EXAMINATION

23 BY MR. BESHORE:

24 Q Mr. Schad, Exhibit 40 includes a fourth page

1 which is a table.

2 A Yes.

3 Q Could you describe the information on that --  
4 on that Table A, what it represents, please?

5 A That table -- I'm sorry. That table was  
6 distributed by the Market Administrator's office around  
7 January 2000 when the new Federal Order was implemented,  
8 and it allowed people to understand the dairy farmer for  
9 other markets provision.

10 What it very -- if you read it, you see the  
11 July, August, September, October, November months, and  
12 it's going from left to right, that would show you that if  
13 a -- a handler caused a dairy farmer to be non-pool during  
14 the month of July, that dairy farmer would be depooled  
15 during that month, the green, and the succeeding December,  
16 January, February, March, April, May, June as well.

17 Q When you say "depooled", you mean not eligible  
18 to be pooled on Order 1?

19 A Withdrawn from the handler reports, so that it  
20 is not -- not reported as pool milk on this Order or any  
21 other Orders, and so you see the June, July, August,  
22 September, October, November have that provision. I think  
23 that's the (b)(e) provision.

24 There's also a provision that during the months

1 of December, January, and February, March, April, May,  
2 June, that there is, in addition to depooling the producer  
3 for one month, the penalty extends for the next two  
4 months. So, if -- if a handler causes a producer to be  
5 non-pooled during December, that producer is obviously  
6 non-pooled December and also ineligible to be pooled on  
7 the market the subsequent January and February. Again, it  
8 works down till it gets to a point, as you see, if a  
9 producer is depooled in May, he is -- the current  
10 regulations would have that -- that pool -- that producer  
11 ineligible to return until July and if the producer is  
12 depooled in June, he is eligible to return in July.  
13 That's the current Dairy Farmer Market provision.

14 Q Thank you.

15 MR. BESHORE: Mr. Schad is available for cross  
16 examination.

17 JUDGE BAKER: Very well. Are there any  
18 questions for Mr. Schad? Mr. Vetne?

19 CROSS EXAMINATION

20 BY MR. VETNE:

21 Q Mr. Schad, the term "other markets" as used in  
22 this -- this exhibit does not include other federal  
23 markets. Producers are free to come and go from federal  
24 markets, correct?

1 A We're referring to the chart?

2 Q Yes.

3 A Yes.

4 Q Yes. Yes, they are?

5 A Yes, they are. They are, as I said.

6 Q This -- this would only apply then to -- to a  
7 handler who might consider the benefits or disbenefits of  
8 taking some milk off the pool to take advantage of the  
9 price inversion?

10 A Well, --

11 Q It would apply in that case?

12 A It would, and as my testimony says that I did  
13 read, it was specifically put into the Order by ADCNE to -  
14 - to the extent that ADCNE could put it -- could put  
15 anything in the Order, due to the unregulated Class 1  
16 plants in in Maine, New York, Pennsylvania, Maryland and  
17 Virginia. So, there are -- there are two reasons for it.

18 Q Okay. Do you know whether this was applied to  
19 the Class 1 plant in Portland, Maine, when it came into  
20 the market and had previously processed milk to be non-  
21 pooled?

22 A No, sir, I do not.

23 Q Going to your comments on Proposal 8, you would  
24 agree, would you not, that any 9-C milk, any milk that's

1 diverted or delivered under 9-C, to a pool supply plant  
2 has been pool-qualified by the cooperative, so causing the  
3 milk to be delivered?

4 A Yes.

5 Q Okay. And you would agree that by -- by  
6 shipping on that milk, it would effectively be required to  
7 be double qualified?

8 A I -- it probably would be the definition of  
9 double qualified, but I would expect the one that you  
10 would give, I would answer affirmatively.

11 Q And -- and the more -- the more cooperative 9-C  
12 milk that a supply plant receives or is willing to  
13 accommodate, the greater the shipping burden on the supply  
14 plant, correct?

15 A I'm not sure what the supply plant buys. If  
16 you put that stipulation on it, I would agree to your  
17 question.

18 Q The plants listed on Exhibit 39, which was  
19 recently marked, Crowley, Eagle, Friendship, Kraft, Pollio  
20 and Chateaugay, --

21 A If they're -- if there's a line of questioning  
22 that comes from that, I don't have it in front of me, but  
23 --

24 Q Are you familiar with those, some of those

1 plants?

2 A If we take -- start from Chateaugay, start from  
3 there, yeah.

4 Q Okay. I mean, those plants are -- are -- are  
5 an important outlet of the market's reserve to allow  
6 producers to be pooled, correct?

7 A I'm not sure to allow producers to be pooled,  
8 but I would say that there -- you know, we've talked a lot  
9 about different kinds of reserves around here, and I would  
10 think that they're definitely an important part of -- of  
11 what Mr. Ling, Dr. Ling would call excess reserves.

12 Q Yes. And you would also agree that if milk  
13 -- well, the ADCNE co-ops supply a lot of milk to these  
14 plants, correct? You have the exhibit now in front of  
15 you.

16 A Again, remember that ADCNE is not a marketing  
17 agent. I can't -- I can't answer that question, but I  
18 would say that you're probably correct.

19 Q All right. The comments that you made on  
20 Proposal 9, let's go to those for a second.

21 A Yes, sir.

22 Q When a supply plant ships milk to a  
23 distributing plant, that distributing plant -- that  
24 shipment is qualified even though the shipping plant has

1 10 percent Class 2 use or 50 percent Class 2 use, correct?

2 A The supply plant ships to a distributing plant?

3 Q Right. The shipment qualifies whether the  
4 receiving distributing plant has 10 percent -- sorry -- 10  
5 percent Class 2 or 50 percent Class 2?

6 A Sure. The distributing plant has to be 25 --  
7 25.

8 Q And the distributing plant can have up to --  
9 theoretically up to 75 percent Class 2?

10 A Yes, sir.

11 Q And that's of milk physically received, and it  
12 doesn't count to your diversion?

13 A Yes, the definition is milk physically received  
14 at the plant.

15 Q And of that 25 percent of receipts, it can be  
16 pooled with as little as 25 percent of that 25 percent  
17 which is 6.25 percent distribution in the Marketing Area?

18 A That would be correct.

19 Q And the distributing plant receiving such milk  
20 that qualifies as a supply plant, with respect to 75  
21 percent of the route distribution can be anywhere outside  
22 from, you know, from Central Pennsylvania to Florida and  
23 Texas, on 75 percent of its distribution and still remain  
24 pooled?

1           A     Yes.  Probably with the assumption that it is  
2 physically located in the Marketing Area.

3           Q     Why?

4           A     Because I believe it's just an oversight.  This  
5 is physically located outside the marketing area.  You  
6 could get into a plurality issue rather than --

7           Q     There's a qualification in Section 7 as to its  
8 locations, 7-A.

9           A     That's probably in all the Orders.  The  
10 question of -- of being qualified in two different Federal  
11 Orders at the same time.

12          Q     Oh, yeah.  That's why we have a plant out in  
13 Utah that's qualified here because it has distribution  
14 throughout the country, but a plurality is marketed in the  
15 Northeast.

16          A     I would -- I would say that regulation.

17          Q     And that plurality represents at least 25  
18 percent of its total distribution?

19          A     I'll take your word for it.  I have -- I have  
20 not had the need to read that provision in a long time.

21          Q     Okay.  Just so I understand here, what -- a  
22 shipment of milk from a supply plant that goes to a  
23 distributing plant, it may be used for Class 2 and may be  
24 used for Class 1 and it's distributed outside of -- of the

1 marketing area is a good thing and should be encouraged,  
2 correct?

3 A Except that probably if it's shipment from a  
4 supply plant to a distributing plant, it probably gets all  
5 Class 1 utilization because you'd want to do that so that  
6 you have the price. From that -- you know, except for  
7 that technical proviso, I would agree to you that there is  
8 basically an allocation.

9 Q And it's shipped directly from the farm as a  
10 diversion, so it gets the allocation?

11 A Yes.

12 Q But it's -- it's -- can you explain why it's  
13 not a good thing, why a supply plant supplying a  
14 competitor with Class 1 and Class 2 should get credit for  
15 supplying the competitor but not get credit for its own  
16 similar Class 1 and Class 2 distributed within the  
17 Marketing Area and outside? Why -- why is that a good  
18 thing?

19 A I guess my testimony is such that your proposal  
20 confuses the 7-A and 7-C.

21 Q How?

22 A It's for the benefit of very few -- very few  
23 people.

24 Q There have been some individual problems since

1 Reform, that you -- did you write this before Friendship  
2 modified and -- and clarified this proposal?

3 A Yes, sir.

4 Q Okay. And many of your concerns that you  
5 address here have -- have been addressed now in  
6 Friendship's modification which is designed to not  
7 inadvertently regulate plants that are currently partially  
8 regulated?

9 A To the extent that -- that your modification  
10 does that portion, I agree with you.

11 Q Okay.

12 A I think ADCNE has a philosophical problem with  
13 the definition when you have two different definitions of  
14 both 7-A and 7-C, especially after the testimony of your  
15 Proponent member. We're talking about 1 or 2 percent of -  
16 - of it. That is the Class 1 utilization at that point.

17 Q Class 1 utilization is 1 or 2 percent, correct,  
18 and yet the receiving plant may have up to 75 percent of  
19 Class 2 and it still gets credit for that and Friendship  
20 hasn't asked for -- well, it asked for it, but it wasn't  
21 granted in the proposal for any Class 2, correct?

22 A No, they did not.

23 Q Yeah. That's unfortunate. But -- and finally,  
24 at the end, you -- you indicate opposition to regulating

1 distributing plants that are not now regulated. Why? Why  
2 is that? Why would you not want to enhance the Class 1  
3 use of the market?

4 A We rejected that.

5 Q Oh. If -- if -- if --

6 A We spoke to the issue -- ADCNE spoke to the  
7 issue in Order Reform. I don't -- I don't know if the  
8 position of the cooperatives has changed, but I did  
9 testify during Order Reform, we had a group that took that  
10 position, and I did not have the luxury of hearing your  
11 testimony. Some maybe would have said this is the same as  
12 Order Reform, why do -- why don't you want that -- that  
13 in, when making clear it was denied.

14 Q Okay. So, you don't have a philosophical  
15 objection to adding Class 1 milk to the market?

16 A No. I -- I don't contest that.

17 Q Okay.

18 MR. VETNE: Thank you. That's all I have.

19 JUDGE BAKER: Are there any other questions?

20 Yes, Mr. English?

21 CROSS EXAMINATION

22 BY MR. ENGLISH:

23 Q But now, since the -- what I thought were clear  
24 waters have been muddied perhaps a little bit. You've

1 done the modification that you oppose Proposal 9 in its  
2 entirety, and one of those reasons is because they would  
3 cause disregulation of those plants, correct?

4 A Correct.

5 MR. ENGLISH: Thank you.

6 JUDGE BAKER: Thank you.

7 CROSS EXAMINATION

8 BY MR. VETNE:

9 Q As it was written prior to modification, prior  
10 to Reform?

11 A We -- we -- we were opposed to -- to Proposal 9  
12 even before and after the modification.

13 Q You do not believe that, as assumed in Mr.  
14 English's question, that it would cause deregulation of  
15 currently-price-deregulated plants?

16 A I believe your modification would -- would make  
17 that -- that point clear. However, that does not change  
18 our position on that, no.

19 Q I understand. But you were answering a  
20 compound question with a single answer, and I wanted to  
21 clarify that.

22 Thank you.

23 A Thank you.

24 JUDGE BAKER: Mr. Tosi has a question.

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CROSS EXAMINATION

BY MR. TOSI:

Q Thanks for coming back, Dennis.

I felt the need to ask this because you're also employed at Land O'Lakes. The proposal to not include as producer milk milk that's already pooled under a state program that has marketwide pooling, --

A Yes.

Q -- in your written testimony there, you specifically cite California. Is it Land O'Lakes position that California indeed has no marketwide pooling?

A I'm not sure. I can -- I won't speak to that issue here. I'm here as a representative of ADCNE.

Q Okay. I'm not trying to do anything here, but there have been other Land O'Lakes representatives here, and I wanted to make sure that --

A I am not going to answer.

Q Okay.

JUDGE BAKER: Are there any other questions for Mr. Schad?

(No response)

JUDGE BAKER: Let the record reflect that there are none.

(Chorus of ayes)

1 JUDGE BAKER: Are there any other witnesses?

2 MR. ENGLISH: To my knowledge, there's one more  
3 witness, Mr. Barnes on Proposal 14.

4 JUDGE BAKER: Very well.

5 MR. ENGLISH: Could we take -- it turns out it  
6 is being printed as we speak. Do we want to take a short  
7 recess?

8 JUDGE BAKER: How much?

9 MR. ENGLISH: Well, I don't know. We're hoping  
10 -- five minutes?

11 JUDGE BAKER: Very well. Five minutes.

12 (Whereupon, a recess was taken.)

13 JUDGE BAKER: On the record.

14 MR. ENGLISH: Your Honor, the statement on  
15 Proposal Number 14 by Mr. Arms, who has been previously  
16 sworn.

17 JUDGE BAKER: Very well.

18 Whereupon,

19 DAVID ARMS, SR.

20 having been previously duly sworn, was recalled as a  
21 witness herein and was examined and testified further as  
22 follows:

23 MR. ENGLISH: And I thank everyone for their  
24 indulgence.



1           2. Other plants in the unit must process at  
2           least 60 percent of monthly receipts of producer milk,  
3           including cooperative 9-C milk, only as Class 1 and Class  
4           2 products and must be located in the Northeast Marketing  
5           Area, as defined in Section 1001.2, in a pricing zone  
6           providing the same or a lower Class 1 price than the price  
7           applicable at the distributing plants located in the unit,  
8           and (3) (text unchanged.)

9           This proposal was originally submitted on  
10          behalf of the H.P. Hood Company, Chelsea, Massachusetts.  
11          It has since been made one of the several proposals  
12          advanced by the NYSDFI handler group. It would allow H.P.  
13          Hood and similarly-situated unit-pool handlers who operate  
14          two or more plants, at least one of which is a pool  
15          distributing plant defined in Section 1001.7(a), greater  
16          flexibility in their operations. It would enable  
17          Proponent handler to help the cooperatives and others by  
18          allowing some Class 3 and Class 4 balancing operations at  
19          the secondary plant in the unit.

20          Present unit pooling standards under Paragraph  
21          (c) unduly restricts utilization of receipts at the  
22          secondary plant exclusively to Class 1 or Class 2 product  
23          use. This requirement is too restrict. It doesn't allow  
24          the secondary unit-pooled plant any flexibility in Class

1       3/Class 4 use similar to that afforded other handlers who  
2       have some Class 3 or Class 4 processing integrated with  
3       their Class 1 and Class 2 operations at a single pool  
4       distributing plant located in the metropolitan area. We  
5       see no reason why the combined unit-pooled operation  
6       should be so competitively restricted in operational  
7       flexibility.

8               As a practical matter, it is important to  
9       recognize that some transfers from a unit-pooled plant may  
10      be assigned Class 3 or Class 4, even though the transfer  
11      may have been intended for Class 2 assignment at the  
12      receiving plant. Also, the current limitations fail to  
13      take into account necessary plant shrinkage and ending  
14      bulk inventory assigned to Class 3 and Class 4,  
15      respectively.

16             The H.P. Hood plant at Vernon, New York, is  
17      presently linked with the Hood Agawam, MA, pool  
18      distributing plant in a single unit-pooled entity pursuant  
19      to 1001.7(e). Agawam is a Class 1 pool distributing plant  
20      while the Vernon plant is primarily engaged in processing  
21      Class 2 products, such as cottage cheese and cream.

22             Over the past year, August 2001 through July  
23      2002, the classified use of receipts at the Vernon plant  
24      has been as follows: Combined Class 1 and Class 2 for

1 Skim-84 percent, for Butterfat-90 percent, for Total  
2 Pounds-84.2 percent; Classes 3 and 4 for Skim-16 percent,  
3 for Butterfat-10 percent, and for Total Pounds-15.8  
4 percent.

5 The above use of milk received at Vernon over  
6 the past year has not changed significantly since the  
7 beginning of the Reform Order. The data shows that Hood  
8 has kept within the rules set under Section 1001.7(e).  
9 Milk assigned Class 3 and Class 4 has been largely  
10 restricted to shrinkage and assignment to bulk milk in  
11 ending inventories.

12 This year, Hood was requested by a cooperative  
13 to condense excess reserve milk at Vernon on a tolling  
14 basis. It was accomplished but requested Class 2  
15 assignment at the transfer plant could not always be  
16 achieved.

17 Our Proposal 14 would provide the necessary  
18 regulatory tools for Hood to assist the cooperative in  
19 handling extra milk at least some of the time during  
20 critical plant capacity limitations faced by the  
21 cooperative. The proposed limitation of no more than 60  
22 percent Class 3 and Class 4 use at the unit-pooled plant  
23 provides the means to help balance the market without  
24 burdening the market pool. If the proposed amendment is

1 adopted, the company might consider plant and equipment  
2 changes there to enhance plant efficiency. The decision  
3 to make the changes, however, are not likely unless the  
4 unit-pooling provision is amended to permit a modest  
5 amount of Class 3 use there. We urge Proposal 14 be  
6 adopted in the interests of orderly marketing. We believe  
7 the amendment is also in the public interest as well."

8 JUDGE BAKER: Thank you, Mr. Arms.

9 Are there any questions for Mr. Arms? Yes,  
10 Mr. Beshore?

11 CROSS EXAMINATION

12 BY MR. BESHORE:

13 Q Mr. Arms, why -- let's put the -- the equipment  
14 that belongs in the plant and operated apart from the  
15 distributing plant unit it now has, is now in, correct?

16 A It could, but it -- it would then have to  
17 change how it makes its pool status, and there are a lot  
18 of complications to that.

19 Q What are the complications?

20 A An example. I believe it was January and  
21 February, the company did elect not to withhold status for  
22 the Vernon plant, and the difficulty that arose is that as  
23 soon as plant status was requested, the plant's normal  
24 skim shipment that they had from that plant to a pool

1 distributing plant in metropolitan New York was assigned  
2 because it was coming from a long-way plant, it was  
3 assigned to the ending inventory at the receiving plant,  
4 and so, therefore, its own transportation credit was  
5 removed and that is inefficient. So, here again, it makes  
6 it difficult to maintain a Class 1 segment of their  
7 business which they really wish to expand. That's one  
8 problem.

9 Q Okay. So, once of the things the plant does  
10 besides processing Class 2 products is operate as a supply  
11 plant to provide skim to other Class 1 operators?

12 A Presently on a very limited basis, but it is  
13 something that they might want to expand.

14 Q Okay. Besides that as a problem, are there  
15 other problems that keep you from just delinking the  
16 plants and make it whatever you want?

17 A That has been suggested and possibly could be  
18 pursued further. However, as a matter of policy, the  
19 company feels they should have the same flexibility as  
20 they -- as another handler in the city who is presently  
21 making its own Class 3 and 4 product in their plant. So,  
22 really the combined unit in Vernon should be considered as  
23 one and should be on the same competitive basis as others  
24 in the city who do both.

1           Q     And the competitive market that -- the  
2 competitive product that you would be doing there would be  
3 what, condensed milk?

4           A     The company only has a condensed plant and that  
5 can be used and was used this year for that, for  
6 condensing for the co-op as the amount of milk was sold  
7 off.

8           Q     So, condensed, when it's sold off, is  
9 classified in the use of a plant to which you sell it or  
10 how is condensed classified?

11          A     I believe it's classified according to the  
12 assignment at the transfer plant.

13          Q     Okay. So, if you sell condensed to a cheese  
14 plant, it's got to be Class 3?

15          A     Correct.

16          Q     But if you sell condensed to an ice cream  
17 plant, it's going to be Class 2?

18          A     Correct.

19          Q     So, your present concern is that when you're  
20 condensing and selling the condensed to a cheese plant,  
21 you might take above the Class 3 limitation in the present  
22 pooling regs?

23          A     Yeah. The present pool requires Class 1 and 2  
24 use. There's no model for any Class 3.

1           Q     Well, there's always some -- some lower class  
2     use in the new, right?

3           A     Correct.  And that is what I have shown in the  
4     statement.  There is some of unavoidable Class 3 and 4 use  
5     in each and every one.  I did not show the actual pounds  
6     from the pool provisions of proprietary information.  
7     However, I did use some percentages which clearly show  
8     that the company has tried to keep within the limits set  
9     by the Order.

10          Q     Okay.  Now, what -- your -- your proposed  
11     amendment would establish an operating limit of what?

12          A     It would permit, to permit the company to have  
13     some Class 3 use there, actually from the condenser  
14     operation.  Milk would be condensed there and moved to  
15     other locations.

16          Q     So, you're proposing that Vernon would be able  
17     to process up to 40 percent of its receipts as Class 1?  
18     Am I reading it right?

19          A     Yes, you are.  That's correct.  We deliberately  
20     chose a high percentage to keep this -- the spirit of the  
21     proposal, the present proposal.

22          Q     You have included now any 9-C milk that you've  
23     purchased at Vernon, correct?

24          A     We would include all receipts.

1 Q All receipts?

2 A Yes.

3 MR. BESHORE: Thank you, Mr. Arms.

4 THE WITNESS: Thank you.

5 JUDGE BAKER: Are there any further questions?

6 CROSS EXAMINATION

7 BY MR. VETNE:

8 Q Mr. Arms, when -- when Vernon is operating as a  
9 pool plant, it sells condensed to someone else's  
10 distributing plant, and it has some Class 2 use in which  
11 they can condense, can part of the Class 1 allocation come  
12 back to Vernon?

13 A Yes, it could. But I do -- I want to include  
14 in the record that the company has not been running their  
15 condenser this whole time, except for opening milk for the  
16 cooperatives.

17 Q Okay. But the plant has on occasion separated  
18 milk and -- and sold skim --

19 A Yes.

20 Q -- to a plant?

21 A Correct.

22 Q And that is something that is not feasible if  
23 the plant is a non-pool plant?

24 A Correct. Because if it isn't assigned the

1 Class 1, then the transportation allowance available is  
2 lost. You see, the Vernon plant is in the 250 zone, and  
3 New York City area is in the 315 zone. So, the loss is  
4 the difference between 250 and 315.

5 Q So, you could do it, but there's a practical  
6 economic barrier?

7 A Correct.

8 Q Thank you.

9 JUDGE BAKER: Are there any other questions?

10 MR. BESHORE: Just one.

11 JUDGE BAKER: Mr. Beshore?

12 CROSS EXAMINATION

13 BY MR. BESHORE:

14 Q Mr. Arms, in your -- in your statement where it  
15 says, "This year, Hood was requested to condense excess  
16 reserve milk at Vernon on a tolling basis. It was  
17 accomplished but requested Class 2 assignment at the  
18 transfer plant could not always be achieved." Do you mean  
19 transferee?

20 A Correct. Same mistake as I made earlier.

21 Q Okay. So, you could not --

22 A That should be changed.

23 Q You couldn't always get the Class 2 --

24 A Well, --

1 Q -- assigned --

2 A -- this is to my knowledge. Now, when the  
3 issue came up and they asked my input, I suggested to them  
4 that they request Class 2 utilization in the spirit of  
5 efficiency of the Order. However, I'm not really certain  
6 how it was assigned. I was advised it may not be that --  
7 come out that way.

8 Q Well, --

9 A But if we -- if we requested it, the  
10 Administrator would recognize that we had tried to do  
11 that.

12 Q If it's going to cheese plants, it's got to get  
13 Class 2, your condensed? It's probably not going to be  
14 Class 4.

15 A That's the problem. I think the cooperative  
16 was also trying to assist in moving it in the right  
17 direction.

18 MR. BESHORE: That's it.

19 JUDGE BAKER: Are there any other questions for  
20 Mr. Arms?

21 (No response)

22 JUDGE BAKER: Let the record reflect that there  
23 are none.

24 Thank you very much.

1 THE WITNESS: Thank you.

2 (Whereupon, the witness was excused.)

3 JUDGE BAKER: Are there any other witnesses to  
4 be presented?

5 (No response)

6 JUDGE BAKER: Let the record reflect that there  
7 is no response.

8 Mr. English?

9 MR. ENGLISH: Your Honor, I would move the  
10 admission of Exhibit 41.

11 JUDGE BAKER: Are there any questions or  
12 objections?

13 (No response)

14 JUDGE BAKER: Hearing none, Exhibit 41 is  
15 admitted and received into evidence.

16 (The document referred to,  
17 having been previously marked  
18 for identification as  
19 Exhibit Number 41, was  
20 received in evidence.)

21 JUDGE BAKER: Anyone who wishes to testify with  
22 respect to any or all of the proposals, you may testify  
23 for or against or otherwise. Is there anyone in the room  
24 who wishes to give testimony or other evidence with

1 respect to the matters before this hearing? Mr. Vetne?

2 MR. VETNE: Your Honor, I have a couple  
3 requests for official notice, and the material I request  
4 is officially published in the USDA statistical material,  
5 and I believe all of it, certainly most of it, is  
6 available on the website. There has been a lot of  
7 reference here to changes since Federal Order Reform and  
8 comparisons before and after.

9 The Northeast Mark Administrator on his website  
10 has statistical data, plants lists, and other regulatory  
11 information, historical information, for the three  
12 Northeast Orders from 1998-1999. I would like that  
13 historical data officially noticed for the Northeast.

14 Should I do all of these at once or --

15 JUDGE BAKER: Well, no. Are there any  
16 questions with respect to that request? Mr. Beshore?

17 MR. BESHORE: Just with respect to exactly what  
18 it is, all historical information in 1998 and 1999 on the  
19 website?

20 MR. VETNE: Just for the Northeast. It's milk  
21 information, utilization, receipts, plant lists, price  
22 information for the Northeast and that's for the three  
23 present Orders, the Middle Atlantic, New York/New Jersey,  
24 and New England.

1           MR. BESHORE: I don't have any objection to  
2 taking notice of those publications. It's a bit unclear  
3 as to what we're actually getting.

4           JUDGE BAKER: Mr. Vetne, what do you intend to  
5 do with this information?

6           MR. VETNE: Well, there are -- there are plants  
7 identified there. There have been plants identified here.  
8 There's a discussion of plants that were pooled that are  
9 no longer pooled, plants that were not pooled that are now  
10 pooled. There are volumes. You know, there's reference  
11 there to class use, demand. Everything that's involved in  
12 this hearing is -- is -- is -- is addressed there.  
13 Everything that's in Exhibit 5. For example, the kinds of  
14 data that's in Exhibit 5 for the historical period is --  
15 is -- is what I think is -- it is relevant.

16           JUDGE BAKER: Very well. Then it's all  
17 available on the website?

18           MR. VETNE: All available on the website.

19           JUDGE BAKER: All right. Thank you. Your  
20 request is so granted.

21           MR. VETNE: Okay. There's a publication by  
22 NASS called "Milk Production, Disposition and Income",  
23 which shows on a broader scale without pool reference  
24 dairy farms and their production by state, again for the

1 years 1998 to date.

2 JUDGE BAKER: Where is that available, Mr.  
3 Vetne?

4 MR. VETNE: That's on the website, on the  
5 National Agricultural Statistics Service site of the USDA  
6 website, and there's a link to that in the Dairy Programs  
7 website and the Dairy Program website is  
8 [www.ams.usda.gov/dairy](http://www.ams.usda.gov/dairy).

9 JUDGE BAKER: Very well. So granted.

10 MR. VETNE: And finally, also available on the  
11 website is one publication, perhaps two, on producer milk  
12 by state and county of origin, that is, milk pooled in --  
13 in various Federal Markets, and it shows by state where  
14 that milk is pooled.

15 JUDGE BAKER: That's on the website?

16 MR. VETNE: That's also on the website.

17 MR. ENGLISH: For all Orders?

18 MR. VETNE: Yes.

19 MR. ENGLISH: Do you mean to include in the  
20 record the publications for all Orders?

21 MR. VETNE: I mean to include that entire  
22 publication because we've also been discussing at this  
23 hearing milk located in and pooled here, milk from -- from  
24 other places, milk located here and pooled elsewhere. For

1 example, shipping down to the Southeast. Those kinds of  
2 movements have been identified throughout this hearing.

3 MR. ENGLISH: Are you going to put the evidence  
4 in on this?

5 MR. VETNE: I don't think so.

6 JUDGE BAKER: Very well. Are there any  
7 objections?

8 (No response)

9 JUDGE BAKER: Hearing none, then official  
10 notice will be granted.

11 Mr. Vetne, anything further?

12 MR. VETNE: That's it. Thank you.

13 JUDGE BAKER: Mr. English?

14 MR. ENGLISH: I also have some official notice  
15 material.

16 JUDGE BAKER: Very well.

17 MR. ENGLISH: There's been reference to the  
18 Southeast Order that was issued terminating the Marketwide  
19 Service Proposal Hearing that was held in 1986. That can  
20 be found at 52 Fed. Reg. for Federal Register, beginning  
21 at Page 15951, etc., for 1987.

22 JUDGE BAKER: Very well.

23 MR. VETNE: Your Honor?

24 MR. ENGLISH: Also, --

1 MR. VETNE: Excuse me.

2 JUDGE BAKER: Yes, Mr. Vetne?

3 MR. VETNE: I'm not going to object to that,  
4 but I -- I don't want by inference or interpretation to  
5 suggest that because we've identified these prior  
6 decisions for official notice, that reference cannot be  
7 made to prior decisions, as a matter of fact, if the  
8 decision incorporates prior decisions and the findings  
9 therein, so we have a continuum and we can refer to the  
10 prior decisions, sort of like we refer to legal decisions  
11 by courts, it's -- it's part of the precedent that governs  
12 our -- our comments here. That's all I want to say.

13 MR. ENGLISH: I don't disagree. I usually do  
14 this, though, Mr. Vetne, and I end up leaving one out, but  
15 part of this is to provide the courtesy to everyone that  
16 these are things that will probably come up in the brief  
17 and therefore I feel you're entitled to somewhat advanced  
18 notice.

19 MR. VETNE: I agree. That's a good idea.

20 MR. ENGLISH: We don't infer that there's an  
21 exclusion.

22 JUDGE BAKER: Very well.

23 MR. BESHORE: Well, I just want to reiterate  
24 Mr. Vetne's comments, so we aren't -- that we agree and

1       there's an understanding that noticing any of these  
2       decisions doesn't exclude the use of references to  
3       decisions of the Secretary published in the Federal  
4       Register that might not be noticed.

5               MR. ENGLISH: Mr. Beshore, I understand that.  
6       I don't have a problem with him. I want to do this as a  
7       courtesy to the parties. I know it happens sometimes  
8       that, you know, Mr. Vetne might have the cite that I don't  
9       have or you might have a cite that I don't have or vice  
10      versa, and this speeds the process for all of us.

11              There's also been reference in this Order to  
12      the proceeding that lasted a bit longer than three days  
13      with respect to cooperative service payments. I think  
14      that one lasted four months. There are two separate  
15      decisions. The first decision at 32 Fed. Reg. 6401,  
16      published on April 20th, 1967. In that decision, it was  
17      decided that yes, cooperative service payments would --  
18      would be permitted in this Order, and then the second  
19      supplemental hearing was to establish provisions for the  
20      Order, 33 Fed. Reg. 109, published July 29th, 1968.

21              Also, I -- I do not have the exact cite, I know  
22      it's available on the website, but there's been reference  
23      here to the Pennsylvania Marketing Order and the premiums  
24      issued thereunder, and so I -- it's a state agency. It's

1 not a government entity, and I intend to ask for at the  
2 time of brief official notice of various documents from  
3 that state agency with respect to Orders issued thereunder  
4 and/or premiums that are issued and enforced in that  
5 jurisdiction.

6 JUDGE BAKER: Are they on the website?

7 MR. ENGLISH: I'm sorry?

8 JUDGE BAKER: Are they on the website?

9 MR. ENGLISH: They are not on the AMS website  
10 because they are not United States Department of  
11 Agriculture documents. I do believe they are available on  
12 the Pennsylvania Marketing Board website, but I don't know  
13 for certain, and if they are not, I will certainly provide  
14 in the record ways that they can be found. Mr. Beshore,  
15 for instance, certainly knows where they can be found. He  
16 appears often in those proceedings as I do.

17 JUDGE BAKER: Very well. As you know, official  
18 notice is granted to sources which are available to  
19 everyone.

20 MR. ENGLISH: I do. These are public agencies  
21 and they are available to everyone.

22 JUDGE BAKER: Very well. Thank you.

23 Does that conclude your --

24 MR. ENGLISH: Yes.

1           JUDGE BAKER: Very well. Does anyone else have  
2 anything to say, testimony to give, or evidence that they  
3 wish to present?

4           (No response)

5           JUDGE BAKER: Let the record reflect that there  
6 is no response.

7           That brings us to the time to consider the  
8 matter of the proposed corrections to the transcripts and  
9 the time for setting the briefings which will occur  
10 hereafter. I am open to suggestions with respect thereto.

11          MR. ENGLISH: Your Honor, I believe the first  
12 question is, when will the transcripts be ready? Once we  
13 cross that bridge.

14          COURT REPORTER: It's supposed to be a five-day  
15 delivery.

16          MR. ENGLISH: Supposed to be five-day delivery.

17          MR. TOSI: Your Honor, my experience with these  
18 hearings around the country on different Marketing Orders,  
19 that we've asked for five-day turn-around, but in every --  
20 in every case, they've always come in much later than five  
21 days later. If -- if I could propose two weeks from  
22 today, the Department would have it available on our Dairy  
23 Programs website, and two weeks from today would be  
24 September 27th, at the earliest.

1 JUDGE BAKER: In other words, you all will have  
2 the transcripts available on September 27th?

3 MR. TOSI: At the earliest, Your Honor.

4 JUDGE BAKER: Let's assume that that occurs,  
5 how much time do you suggest for the proposed corrections  
6 to the transcript? Remember we've got four full days of  
7 hearing.

8 MR. ENGLISH: Two weeks, Your Honor? Which  
9 would be October 11th, I believe.

10 JUDGE BAKER: Very well. October 11th.

11 MR. ENGLISH: That's a Friday. Monday's a  
12 holiday.

13 JUDGE BAKER: Very well. Then October 11th is  
14 the date indicated for the submission of proposed  
15 corrections to the transcripts.

16 Thereafter, what are the suggestions for  
17 submitting briefs?

18 MR. ENGLISH: 30 days thereafter, Your Honor?

19 JUDGE BAKER: November 11th? That's a holiday.

20 MR. ENGLISH: So, November 12th?

21 JUDGE BAKER: November 12th.

22 MR. TOSI: Your Honor, may I also recommend,  
23 what we've been doing in the past proceedings is that for  
24 every day that the Department is late -- for every day

1 past the 27th that the Department is late in having them  
2 available on our website, the transcripts on our website,  
3 all other -- that the date for the submission of  
4 corrections and the date for briefs would -- would be  
5 extended the same number of days?

6 MR. BESHORE: That procedure has been -- has  
7 worked very well, and I agree wholeheartedly with Mr.  
8 Tosi's suggestion, Your Honor.

9 JUDGE BAKER: I'm not familiar with that.  
10 Usually I desire certainty with respect to the carrying  
11 out of obligations, but I'm willing to go along with that  
12 and you may have a marvel of achievement.

13 MR. ENGLISH: Well, again, Your Honor, it  
14 really has worked, and frankly, I think it provides for  
15 more certainty for us, but I can understand that it hasn't  
16 been something that you've done before. Literally, I  
17 think almost all of us in the room have done this, and we  
18 would appreciate it if we could do it that way.

19 JUDGE BAKER: If you wish to do it that way,  
20 the record will so reflect, and we'll look forward to  
21 having a happy ending to this.

22 Are there any other matters to come before the  
23 hearing? Yes, Mr. Vetne?

24 MR. VETNE: Yes. I don't have a problem with

1 the briefs. We've also sort of changed that a little bit  
2 in the past year or two. Mail is still being screened and  
3 it will take some time to get that through and sometimes  
4 it doesn't get through. So, our practice has been to  
5 provide an e-mail or fax. Most of us use e-mail-attached  
6 copy to the Dairy Division and the Dairy Division then  
7 will make a copy and take it down and get it stamped in  
8 with the hearing clerk. That way, they have their brief  
9 expeditiously and can start working on it and -- and we  
10 also send courtesy copies to each other. It's not  
11 required by the rules, but it's a good thing to do.

12 Thank you.

13 JUDGE BAKER: Mr. Tosi?

14 MR. TOSI: Yes, Your Honor. I have no  
15 objection to that, but I would ask that if the parties are  
16 asking me to submit a copy on their behalf to the hearing  
17 clerk, which I'm happy to do, that they specify that.  
18 Sometimes I'm not sure if they're just sending a copy to  
19 me as a courtesy or -- or if they're also asking me to --  
20 to deliver it to the hearing clerk's office as well. Just  
21 please specify and we'll take care of it.

22 JUDGE BAKER: This is what I'm wondering. What  
23 if the time becomes important? Whether a brief is timely  
24 filed or not, it's received in your office, but it isn't

1 filed until later on.

2 MR. TOSI: Yes, Your Honor. When someone sends  
3 an e-mail to us, included on that e-mail is the date and  
4 time which that document was sent to us.

5 JUDGE BAKER: Yes, that presumes an e-mail.

6 MR. TOSI: Yes.

7 JUDGE BAKER: Ordinary mail. Would you send  
8 ordinary mail through?

9 MR. VETNE: Ordinary mail is the date of  
10 postmark, not the date of receipt, and an e-mail receipt  
11 and postmark or postmark equivalent are the same day.

12 JUDGE BAKER: All right.

13 MR. TOSI: Your Honor, just as an interesting  
14 tidbit, at our last hearing, I got some things in the mail  
15 where I could not determine what the post date was because  
16 the post office has been stamping the envelopes that the  
17 documents arrive in, and in fact, with the e-mail, it's  
18 sort of foolproof in the sense that it's very accurate  
19 with respect to giving not only the date but the exact  
20 time the sender actually hit the send button.

21 JUDGE BAKER: Very well.

22 MR. TOSI: That has not been a burden at all  
23 for us.

24 JUDGE BAKER: Very well. Are there any other

1 matters to come before the hearing?

2 (No response)

3 JUDGE BAKER: Let the record reflect that there  
4 are none.

5 MR. TOSI: I'd just like to thank everybody for  
6 a good hearing.

7 MR. ENGLISH: Thank you.

8 MR. TOSI: And, Your Honor, thank you.

9 JUDGE BAKER: Well, I thank you all.  
10 Everything was well prepared and very efficient.

11 Thank you all, and the hearing is adjourned.

12 (Whereupon, at 5:45 p.m., the hearing was  
13 concluded.)

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